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In the Supreme Court of the United States

OCTOBER TERM, 1977

NABISCO, INC. and PEPSI-COLA GENERAL BOTTLERS, INC.,

Appellants,

v.

BERNARD KORZEN, et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

JURISDICTIONAL STATEMENT

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TABLE OF CONTENTS

	PAGE
Opinions Below	2
Jurisdiction	2
Statutes Involved	3
Constitutional Provisions Involved	4
Questions Presented	4
Statement of the Case	5
Statement of Facts	7
Northwestern University	7
The Nabisco Leases	8
The Pepsi-Cola Lease	9
The Impact and Significance of the Taxes	10
How the Federal Questions Were Presented	12
The Federal Questions are Substantial	13
I. The Illinois Court's Decision Permitting the State to Deprive Northwestern of the Benefit of Its Charter Exemption By a Change in the Form of the Tax is an Unconstitutional Impairment of Contract Obligations and Conflicts with this Court's Prior Decisions	13
II. Even if the Burden of the Leasehold Tax Were Borne for Several Years by Northwestern's Lessees, the Tax Would Violate the Lessees' Rights to Equal Protection of the Laws	22
Conclusion	26

APPENDICES

PAGE

Appendix 1 — Judgment of the Supreme Court of Illinois ..... App. 1

Appendix 2 — Preliminary Injunction Order of the Circuit Court of Cook County, Illinois in the *Nabisco* case, dated December 23, 1975 ..... App. 20

Appendix 3 — Final Order of the Circuit Court of Cook County, Illinois in the *Pepsi-Cola* case, dated July 21, 1975 ..... App. 23

Appendix 4 — Order Denying Rehearing by the Supreme Court of Illinois, dated November 23, 1977 ..... App. 25

Appendix 5 — Notice of Appeal filed in the Supreme Court of Illinois, dated February 14, 1978 ..... App. 26

Appendix 6 — Charter of Northwestern University, enacted 1851, as amended 1855 App. 28

CITATIONS

Central of Georgia Ry. Co. v. Wright, 248 U.S. 525 (1919) 18, 20, 21

Cohen v. California, 403 U.S. 15 (1971) 3

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921) 3

Hardy v. Inhabitants of Waltham, 24 Mass. (7 Pick.) 108 (1828) 20

Hillsborough v. Cromwell, 326 U.S. 620 (1946) 24

PAGE

In re Assessment of Northwestern Univ., 206 Ill. 64, 69 N.E. 75 (1903) 6, 15

Jetton v. University of the South, 208 U.S. 480 (1908) 20, 21

Northwestern Univ. v. Hanberg, 237 Ill. 185, 86 N.E. 734 (1908) 6, 7, 15

People ex rel. County Collector of Cook County v. Northwestern Univ., 51 Ill.2d 131, 281 N.E.2d 334, *cert. denied,* 409 U.S. 852 (1972) 6, 7, 8, 15

Phillips Chem. Co. v. Dumas Ind. School Dist., 361 U.S. 376 (1960) 24

Trimble v. City of Seattle, 231 U.S. 683 (1914) 24

Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) 3, 8

University v. People ex rel. Miller, 99 U.S. 309 (1878) 6, 15

Walter Reade, Inc. v. Township of Dennis, 36 N.J. 435, 177 A.2d 752 (1962) 20

Wright v. Central of Georgia Ry. Co., 236 U.S. 674 (1915) 18

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JURISDICTIONAL STATEMENT

Appellant Nabisco, Inc. ("Nabisco") appeals from the judgment of the Supreme Court of Illinois, entered on September 20, 1977, which reversed the issuance of an injunction by the Circuit Court of Cook County, Illinois. Appellant Pepsi-Cola General Bottlers, Inc. ("Pepsi-Cola") appeals from the same September 20, 1977 judgment of the Supreme Court of Illinois, which affirmed the dismissal by the Circuit Court of Cook County, Illinois of Pepsi-Cola's suit for failure to state a cause of action. Nabisco and Pepsi-Cola submit this Statement to demonstrate that the Supreme Court of the United States has

jurisdiction of this appeal and that substantial federal questions are presented.

OPINIONS BELOW

The opinion of the Supreme Court of Illinois, reported at 68 Ill.2d 451 and at 369 N.E.2d 829, is reproduced in Appendix 1 to this Statement. The injunction order of the Circuit Court of Cook County, Illinois in the *Nabisco* case and the dismissal order of that Court in the *Pepsi-Cola* case are reproduced in Appendices 2 and 3, respectively.

JURISDICTION

These appeals involve two suits by lessees of Northwestern University to enjoin application of the Illinois leasehold tax statute to real estate owned by Northwestern University, which was exempted from taxation by the State of Illinois pursuant to an 1855 amendment to its Charter.[1] In the *Nabisco* case, the Circuit Court granted a preliminary injunction against assessment and collection of the tax and the taxing officials appealed. In the *Pepsi-Cola* case, the Circuit Court dismissed the complaint and Pepsi-Cola appealed. The judgment of the Supreme Court of Illinois, which reversed the *Nabisco* preliminary injunction and affirmed dismissal of the *Pepsi-Cola* complaint was entered on September 20, 1977, and appellants' timely petitions for rehearing were denied on November 23, 1977. A joint notice of appeal on behalf of Nabisco and Pepsi-Cola was filed in the Supreme Court of Illinois on February 14,

[1] Defendants-Appellees Bernard Korzen, Edward J. Rosewell, P. J. Cullerton, Thomas Tully, and Stanley Kusper are present or former officials of Cook County, Illinois, responsible for the assessment and collection of the tax. Cook County, Illinois itself also is a defendant-appellee.

1978. The order denying rehearing and the Notice of Appeal are reproduced in Appendices 4 and 5, respectively.

The decision of the Supreme Court of Illinois conclusively determines that the leasehold tax statute is to be construed so as to tax real estate leased from Northwestern University. That decision upholds the validity of the Illinois statute against appellants' challenges that, as applied here, the statute impairs Northwestern's 120-year old charter from the State of Illinois in violation of the Contract Clause of the United States Constitution and the consistent precedents of this Court since *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518 (1819), and denies appellants equal protection of the laws.

The jurisdiction of this Court is invoked under 28 U.S.C. §§1257(2) and 2101(c). The following decisions sustain the jurisdiction of this Court to review on direct appeal a judgment sustaining the constitutionality of a state statute as applied to the facts of a particular case: *Cohen* v. *California*, 403 U.S. 15, 17-18 (1971); *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 287-90 (1921).

Statutes Involved

The Illinois leasehold tax statute which is the subject of this litigation is Section 26 of the Illinois Revenue Act, *Ill.Rev.Stat.*, 1975, Ch. 120, § 507, which provides:

> "When real estate which is exempt from taxation is leased to another whose property is not exempt, and the leasing of which does not make the real estate taxable, the leasehold estate and the appurtenances shall be listed as the property of the lessee thereof, or his assignee, as real estate."

All real estate owned by Northwestern University is exempt from taxation under Section 4 of an 1855 amend-

ment to the Illinois statute incorporating Northwestern, 1855 Ill. Laws 483, which provides:

> "§ 4. That all property of whatever kind or description belonging to, or owned by said corporation [Northwestern University] shall be forever free from taxation for any and all purposes."

The full text of Northwestern's corporate charter, granted by State of Illinois in 1851, and the 1855 amendment granting Northwestern's charter tax exemption are reproduced in Appendix 6.

Constitutional Provisions Involved

The provisions of the Constitution of the United States involved in this case are:

Article I, Section 10, which provides:

> "No state shall . . . pass any . . . Law impairing the Obligation of Contracts."

Section 1 of the Fourteenth Amendment, which provides:

> "No state shall . . . deny to any person within its jurisdiction the equal protection of the laws."

QUESTIONS PRESENTED

1. Consistent with the Contract Clause of the Constitution of the United States and Northwestern's charter, which exempts from taxation real estate owned by the University and leased to commercial lessees, may the State of Illinois impose a leasehold tax upon Northwestern's lessees, the burden of which will fall upon Northwestern and thereby deprive Northwestern of substantially all benefit from its charter exemption?

2. Assuming that the burden of the leasehold tax might fall (in the short-term) upon Northwestern's lessees, does the leasehold tax deprive the lessees of equal protection of the laws?

STATEMENT OF THE CASE

This appeal arises from the latest attempts of the taxing officials of Cook County, Illinois to secure for the County real estate tax revenues from land owned by Northwestern University and leased to business firms for commercial use. Northwestern's corporate charter provides that its property "shall be forever free from taxation for any and all purposes." (NR. C53).[2]

The Cook County authorities have repeatedly attempted to limit Northwestern's tax exemption to land actually devoted to educational use and to impose real estate taxes upon property rented to commercial lessees. A series of decisions by this Court and the Supreme Court of Illinois have established that the charter conferred upon Northwestern University by the Illinois General Assembly is a contract which may not be impaired without violating Article I, Section 10 of the Constitution of the United States. These decisions have all involved real estate leased by Northwestern to commercial lessees and have established the proposition that it was within the purpose and intendment of the charter to give Northwestern, rather than the Cook County tax authorities, the benefit of the funds which could have been collected from these properties in real estate taxes. Northwestern collects these funds from its lessees as "additional rent in lieu of taxes" and uses the money to further its educational programs.

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[2] Throughout this Statement, references to the Circuit Court record in the *Nabisco* case are designated "NR. C ....." and to the Circuit Court record in the *Pepsi-Cola* case "PR. C ....." Pursuant to Rule 12 of the Rules of this Court, appellants have requested the Clerk of the Supreme Court of Illinois to certify and transmit to this Court the entire records from both cases. (See App. 27).

This Court and the Supreme Court of Illinois have repeatedly sustained the scope of the charter exemption and rejected various attempts by the taxing authorities to appropriate for themselves instead of Northwestern the real estate tax revenues from the property Northwestern leased for commercial purposes. As this Court held in the first of this series of "Northwestern charter cases," *University* v. *People ex rel. Miller*, 99 U.S. 309 (1878):

> "The purpose of a college or university is to give youth an education. The money which comes from the sale or rent of land dedicated to that object aids this purpose. Land so held and leased is held for school purposes, in the fullest and clearest sense." 99 U.S. at 324.

In re Assessment of Northwestern Univ., 206 Ill. 64, 67-68, 69 N.E. 75, 77 (1903); *Northwestern Univ.* v. *Hanberg*, 237 Ill. 185, 190-91, 86 N.E. 734, 736 (1908); *People ex rel. County Collector of Cook County* v. *Northwestern Univ.*, 51 Ill.2d 131, 136-37, 281 N.E.2d 334, 337, *cert. denied*, 409 U.S. 852 (1972).

This consolidated appeal arises from renewed attempts by Cook County tax officials to collect tax revenues in violation of Northwestern's charter—this time by using a 100-year old statute to impose a leasehold tax upon Northwestern's commercial lessees. Nabisco and Pepsi-Cola, lessees of Northwestern, sued to enjoin the imposition of this tax. The Supreme Court of Illinois, by a 4-to-2 majority, has sustained the validity of the imposition of such tax, despite a recognition by that Court and by all parties that the financial burden of the leasehold tax would fall upon Northwestern, either immediately or within a few years. Appellants contend that any imposition now of such a burden on Northwestern's lessees violates Equal Protection, and that the immediate or eventual pass-through of such a tax burden to Northwestern will impair the University's charter contract by depriving Northwestern of the primary benefit of that contract—a tax exempt subsidy from leased real property which has for many years contributed to the support of the University's educational programs.

Statement of Facts[3]

Northwestern University

Northwestern's charter from the State of Illinois, as amended in 1855, authorizes the University to hold up to 2,000 acres of land (App. 30), and declares that the University's property "shall be forever free from taxation for any and all purposes." (App. 33). The object intended by these provisions was the encouragement of the establishment of the University by granting to it "perpetual freedom from taxation." *Northwestern Univ.* v. *Hanberg*, 237 Ill. 185, 191, 86 N.E. 734, 736 (1908). Schools of higher learning were then scarce in Illinois, and the legislature which granted the Northwestern charter exemption awarded similar perpetual charter tax exemptions to more than 80 private institutions, only a small number of which have survived until today. *People ex rel. County Collector* v. *Northwestern Univ.*, 51 Ill.2d 131, 134-35, 281 N.E.2d 334, 336-37, *cert. denied*, 409 U.S. 852 (1972); *Northwestern Univ.* v. *Hanberg*, 237 Ill. 185, 191-92, 86 N.E. 734, 736 (1908). The Supreme Court of Illinois has recognized that

[3] In the Circuit Court, Pepsi-Cola's complaint was dismissed for failure to state a cause of action and a preliminary injunction was granted to Nabisco solely on the basis of the allegations of its complaint. Consequently, the allegations of the complaints must be accepted as true for purposes of this appeal. Those allegations and certain judicially recognized historical facts form the basis of this Statement of Facts.

the purpose of this exemption was "to bring about the donation of money or property" to Northwestern. *People ex rel. County Collector* v. *Northwestern Univ.*, 51 Ill.2d 131, 135, 281 N.E.2d 334, 336, *cert. denied*, 409 U.S. 852 (1972). This Court had recognized long ago that the reason for treating such charters of private institutions as inviolate contracts is to assure donors that the private institutional purposes for which they dedicate gifts will remain immune to legislative change. *Trustees of Dartmouth College* v. *Woodward*, 17 U.S. (4 Wheat.) 518, 547-52 (1819).

The Northwestern charter requires the University to apply all funds collected and "the proceeds of the property belonging to said institution" solely for the educational purposes enumerated in the charter. (App. 30). Northwestern currently owns 434 acres of land of which 71 acres are leased and the revenues used for educational purposes. (NR. C55).

The Nabisco Leases

Nabisco has leased from Northwestern two improved parcels of real estate located in Harvey, Illinois and Broadview, Illinois since December 28, 1962 and May 28, 1963, respectively. (NR. C58-59).

The total rent which Nabisco pays Northwestern under these leases (more than $90,000 during 1974) represents fair market rental values of the leaseholds over the terms of the leases. Nabisco pays no less rent for its leased properties than it would pay if Northwestern were not tax exempt. Nabisco pays the same rent paid by other lessees for comparable leaseholds leased from nonexempt lessors. (NR. C55). In short, Nabisco receives no benefit from Northwestern's charter tax exemption. The portion of the

rent that a nonexempt lessor would use for the payment of real estate taxes is collected by Northwestern as rent in lieu of taxes and used for its educational operations. These funds in effect constitute a subsidy given to Northwestern by reason of its charter.

Both Nabisco leases expressly provide that a set portion of the rent represents a payment "in lieu of" taxes, which is defined in the leases as the estimated amount "which, but for the exemption of the lessor [Northwestern] from such taxes, would be payable with respect to the demised premises." (*E.g.*, NR. C147).

During 1974, Nabisco paid Northwestern $7,160.00 and $12,726.00 as rent in lieu of taxes on the Harvey and Broadview leaseholds. The County has sought to collect 1974 leasehold taxes on these parcels in the amounts of $13,937.37 and $24,137.45, respectively. Based upon Nabisco's complaint, the Circuit Court entered a preliminary injunction against the assessment and collection of the tax. (App. 20). The decision of the Supreme Court of Illinois reversing the issuance of that injunction forms the basis of Nabisco's appeal.

The Pepsi-Cola Lease

Since October 31, 1956, Pepsi-Cola has leased from Northwestern improved real estate located at 600-658 West 51st Street in Lake Township, Chicago, Illinois. (PR. C3).

Like the Nabisco leases, the Pepsi-Cola lease provides for a basic yearly rental and an additional rent "in lieu of" taxes. In the Pepsi-Cola lease, this additional rent is defined as "the approximate equivalent of the amount of general real estate taxes which would be assessed and levied

upon the premises herein were it not for the stated exemption of the Lessor." (PR. C4). The lease provides for periodic adjustments of the rent "in lieu of" taxes so that this portion of the rent will be comparable to current real estate tax levels. (PR. C4-5). Since the lease was executed, Pepsi-Cola has paid base rent and tax lieu rent to Northwestern and had not paid real estate taxes or leasehold taxes to Cook County. (PR. C5).

For the year commencing November 1, 1974, Northwestern claims that in addition to the base rent of $138,000, Pepsi-Cola owes it $87,150 in tax lieu rent under the lease. (PR. C5). On August 7, 1974, Pepsi-Cola received from Cook County a 1973 county real estate tax bill seeking payment by Pepsi-Cola of a leasehold tax concerning this property in the amount of $83,498.10. (PR. C6). Pepsi-Cola sued to enjoin the collection of that tax. The dismissal of its complaint for failure to state a cause of action forms the basis of Pepsi-Cola's appeal.

The Impact and Significance of the Taxes

This appeal involves one year's leasehold taxes for each of three leaseholds. However, Cook County has been back-taxing Northwestern leaseholds for all years as far back as 1970. Furthermore, it is clear that the decision of the Supreme Court of Illinois upholding the validity of these leasehold taxes will constitute a controlling precedent in Illinois as to all Northwestern lessees and as to past and future tax years.[4]

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[4] Of course, additional issues and defenses might be presented as to particular tax years. However, the decision of the Supreme Court of Illinois purports to resolve the basic issue of whether these leasehold taxes may be imposed consistent with Northwestern's charter and with the constitutional requirement of equal protection of the laws.

As the specific tax bills and rent payments referred to above demonstrate, Cook County is attempting to collect, as taxes on the "leasehold interests," amounts approximately equal to or greater than the sums the parties to the leases have agreed upon as the equivalent of general real estate taxes on the entire property. There is a dispute between Northwestern University on the one hand and its lessees, Nabisco and Pepsi-Cola, on the other as to whether the provisions of the current leases permit the lessees to reduce their rental payments by the amounts of the leasehold taxes (at least to the extent of their "rent in lieu of taxes" obligations) or whether the lessees must temporarily pay both the leasehold taxes and the rent in lieu of taxes. However, since the total rents already reflect fair market rental values, the lessees and Northwestern (as *amicus curiae*) have argued (without dispute from defendants or from the Supreme Court of Illinois) that either immediately or within a few years, the full economic burden of the leasehold taxes will be borne by Northwestern.

At that point, to use the 1973 Pepsi-Cola tax bill as an example, Northwestern will have lost $83,000 of its $87,000 annual "rent in lieu of taxes" because that $83,000 will have been paid to the County in leasehold taxes. Since the "rent in lieu of taxes" is the only benefit which Northwestern derives from the leases because of its charter tax exemption (see p. 17 below), the impact of the decision of the Supreme Court of Illinois will be to deprive Northwestern of substantially all benefit of its tax exemption on its leased real estate.

The cumulative effect of enforcing a leasehold tax as to all Northwestern's lessees ultimately may reduce Northwestern's annual income by as much as $1,000,000. (NR. C57). This would be the equivalent of eliminating more than two-thirds of Northwestern's annual budget for library books. (NR. C57-58). In an *amicus* brief filed in the Supreme Court of Illinois, Northwestern stated that "the

impact of this tax would have placed the University in deficit positions for fiscal periods 1973-1974 and 1974-1975." (Northwestern Br. 13).

How the Federal Questions Were Presented

Two constitutional questions are raised on this appeal:

(1) Does application of the Illinois leasehold tax statute to Northwestern's lessees unconstitutionally impair Northwestern's charter tax exemption? and

(2) Does the Illinois statute unconstitutionally deny equal protection of the laws to Northwestern's lessees?

Both constitutional arguments were raised in the Illinois courts and both were considered and rejected by the Supreme Court of Illinois in its judgment of September 20, 1977.

The constitutional issues were raised in the *Nabisco* complaint (NR. C52-58, 72-73) and in the *Pepsi-Cola* complaint. (PR. C7). They also were argued in the briefs filed by Pepsi-Cola and Nabisco in the Circuit Court.

In the *Nabisco* case, the County officials first appealed to the Appellate Court of Illinois and then successfully moved to transfer the appeal to the Supreme Court of Illinois. In their transfer motion, the County Officials described the issues on appeal in pertinent part as:

> "(a) Whether the County defendants are prohibited from assessing and collecting the leasehold tax against lessees of Northwestern on account of Northwestern's Charter Exemption.
>
> • • •
>
> "(c) Whether the leasehold tax (Section 26 of the Revenue Act) violates Equal Protection by unconstitutionally discriminating against lessees of tax exempt lessors as opposed to lessees of non-tax exempt lessors." (Motion to Transfer Interlocutory Appeal to the Supreme Court, dated Feb. 3, 1976, ¶ 9).

These constitutional issues were argued in all of the briefs filed with the Supreme Court of Illinois and in appellants' petitions for rehearing in that Court.

These were the two issues considered by the Supreme Court of Illinois in its opinion. First the Court considered whether the leasehold tax on property owned by Northwestern "is a constitutionally impermissible impairment of the contract." (App. 5-9). The Court then considered and rejected the equal protection argument. (App. 9).

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

I. The Illinois Court's Decision Permitting the State to Deprive Northwestern of the Benefit of Its Charter Tax Exemption By A Change in the Form of the Tax Is An Unconstitutional Impairment of Contract Obligations and Conflicts With This Court's Prior Decisions.

The principal issue on this appeal is whether the imposition of the leasehold tax upon property owned by Northwestern University constitutes an impermissible impairment of the obligations of contracts in violation of Article I, Section 10 of the United States Constitution.[5] The decision of the Supreme Court of Illinois permits the taxing authorities to deprive Northwestern of the benefits of its charter tax exemption and to accomplish, by a change in the form of tax, what prior decisions had held to constitute an impermissible impairment of contract obligations.

The Northwestern charter exemption has been the subject of litigation extending over more than a century. Each

[5] The lessees, upon whom the leasehold tax is imposed, clearly have standing to assert that Northwestern's character prohibits imposition of this tax. Indeed, the taxing authorities must themselves introduce the charter exemption into the litigation in order to demonstrate that the real estate is tax exempt and that the leasehold tax statute is applicable. As the Supreme Court of Illinois stated:

> "Whether the leasehold estates are taxable depends upon the scope of the tax exemption granted in the charter, and the right to pass on to Northwestern as lessor the amount of any taxes which they are called upon to pay is in dispute. Under these circumstances, plaintiffs clearly have standing to invoke the charter exemption as a ground for holding to tax invalid." (App. 5).

decision has upheld the charter as an enforceable contract between Northwestern and the State of Illinois. Each decision has struck down an attempted taxation of Northwestern's property as an unconstitutional impairment of contract obligations. *University* v. *People ex rel. Miller*, 99 U.S. 309 (1878); *In re Assessment of Northwestern Univ.*, 206 Ill. 64, 69 N.E. 75 (1903); *Northwestern Univ.* v. *Hanberg*, 237 Ill. 185, 86 N.E. 734 (1908); *People ex rel. County Collector of Cook County* v. *Northwestern Univ.*, 51 Ill.2d 131, 281 N.E.2d 334, *cert. denied*, 409 U.S. 852 (1972).

Furthermore, each of these decisions involved attempts by the taxing authorities to impose taxes upon real estate Northwestern had leased to business firms for commercial use. In each case the issue concerned who was entitled to the funds which would have been collected from the leased real estate as real estate taxes if the property were not exempt. The taxing authorities sought this money. However, in each case, the Courts held that the charter exemption required that the funds which would otherwise have gone to pay real estate taxes be retained by Northwestern for use in furthering its educational programs. The Courts held that the charter exemption was intended to encourage donations to Northwestern and to provide an indirect subsidy to the University.

In the cases at bar the taxing authorities now assert that a 100-year old statute gives them the right to collect taxes from the property through the technique of imposing those taxes upon the "leasehold interests" of the Northwestern lessees. But regardless of this change in form, there is no doubt that the burden of these taxes will fall upon Northwestern and deprive the University of the very funds which the prior decisions have held were guaranteed to

Northwestern by the constitutional prohibition against the impairment of contract rights.

We have already observed (through the examples of the 1973 and 1974 taxes) that the leasehold taxes imposed by Cook County are equal to or greater than the "rent in lieu of taxes" which Northwestern collects from its lessees as its benefit from the charter exemption. Obviously, no lessee will voluntarily pay "rent in lieu of general real estate taxes" to Northwestern if the lessee must simultaneously pay an amount equal to these estimated real estate taxes as "leasehold taxes." Consequently, if the leasehold taxes are sustained, the Northwestern lessees will, at the earliest possible moment, cease paying "rent in lieu of taxes" or at least reduce those rental payments by the amount of the leasehold tax. Depending upon the interpretation of Northwestern's current leases (which are in dispute between Northwestern and the lessees), this will either occur immediately or, at the latest, when the lessees are presented with an opportunity to renegotiate their leases. Of course, once the "rent in lieu of taxes" payments to Northwestern have been replaced by the payment of leasehold taxes to Cook County, the burden of the leasehold tax effectively will have been shifted to Northwestern.

There is really no dispute among the parties to this litigation or among the Justices of the Supreme Court of Illinois that the burden of the leasehold taxes will ultimately fall upon Northwestern. As the dissenting opinion in the Supreme Court of Illinois stated:

> "In discussing the effect of the taxes here in question defendants concede that sustaining the tax will result in a reduction in Northwestern's income from its leased property by compelling the university, depending on the interpretation of its lease clauses, to reimburse its lessees for taxes paid, forgo its right to

> the additional rent it now receives in lieu of taxes, or accept a lower rental when its leases must be renegotiated. The allegations by plaintiffs and Northwestern that these immediate or ultimate losses of income resulting from imposition of the tax will exceed $1,000,000 are not contradicted." (App. 15).

Once this shift has occurred, Northwestern will be deprived of the benefits of the charter tax exemption and of the very funds which were at issue in the prior litigation. Northwestern does not need a charter tax exemption to avoid paying taxes on real estate on which school buildings are located. Land thus directly used for educational purposes is generally exempt from real estate taxes. *Ill. Rev. Stat.* 1975, Ch. 120, §500.1. Throughout the century of litigation concerning Northwestern's exemption, Northwestern's only benefit from that exemption has been its ability to collect and devote to educational uses funds which (except for the tax exemption) would have been paid as real estate taxes on property Northwestern leases to commercial users. These funds are effectively taken from Northwestern and paid to Cook County by the decision of the Supreme Court of Illinois.

In effect, the Supreme Court of Illinois has permitted Cook County to accomplish by a change in the form of the tax a total deprivation of Northwestern's benefits under its charter tax exemption—a deprivation and contract impairment which was attempted in each of the cases and each time thwarted by the Courts' decisions. In effect, the Supreme Court of Illinois has said that although the Constitution of the United States prevented Cook County from confiscating Northwestern's "rent in lieu of taxes" in 1878, in 1903, in 1908 and again in 1972, the constitutional protection would have been rendered inoperative and the confiscation approved if in each of those years the County had labeled the tax a "leasehold tax" and sent the tax bill to the lessee rather than to Northwestern.

There is a substantial federal question: whether the constitutional provision forbidding impairment of contract rights can be nullified by such a change in language and form.

Appellants respectfully submit that, as correctly viewed by the dissenters below (App. 17), the decision of the Supreme Court of Illinois is directly in conflict with this Court's prior decisions in the *Central of Georgia* cases, *Wright* v. *Central of Georgia Ry Co.*, 236 U.S. 674 (1915) and *Central of Georgia Ry. Co.* v. *Wright*, 248 U.S. 525 (1919). These cases established the principle that where a charter tax exemption is granted for the purpose of subsidizing the charter institution, a State will not be permitted to evade its contract obligations by the device of imposing a tax upon the lessee or by the technique of calling the imposition a "leasehold tax."

Both of the *Central of Georgia* cases arose out of the same charter provisions. Two railroads had been granted charters which prohibited their real estate from being taxed at a rate higher than .5% of their annual income. In the first case, the state attempted to impose real estate taxes upon the lessee of the property arguing (as do defendants in the Supreme Court of Illinois here) that the charters protected only the lessors and did not prohibit taxes against the lessee.

This Court concluded that the taxes violated the charter. *Wright* v. *Central of Georgia Ry. Co.*, 236 U.S. 674 (1915). Since the charter permitted the leasing of the property, imposition of a tax on the lessee would arbitrarily and unfairly take back the substance of the exemption previously granted. This Court stated, in language equally applicable to the case at bar:

> "*We cannot suppose that the Legislature meant either to practice a cunning deception or to make a futile grant. Therefore, we are unable to read the charter as making the exemption vain by reserving to the State an unlimited right to impose upon the lessee all that it had renounced as against the lessor.* For that was to give notice to the parties, if they were supposed to know the law, that the exemption would be lost if the income was earned in one of the contemplated ways [by leasing the property]—or, if they were supposed ignorant, was to invite them to a bargain that was to have an unexpected and disastrous result." 236 U.S. at 679 (emphasis added).

In reaching that conclusion, this Court rejected arguments, such as those made by defendants here, that the railroads were attempting to extend the benefit of the charter to the lessee. This Court pointed out (as is true in the case at bar) that the invalidation of the tax was necessary to secure the benefits which had been promised to the lessor, stating:

> "We are not suggesting that the contract in the charters of the lessors passed by assignment to the lessee, nor are we implying that the property was exempted generally, into whosesoever hands it might come. . . . We construe those statutes as making the fee exempt from other taxation than that provided for, in favor as well of the lessee as of the lessor--*the protection of the lessee being necessary in order to make good that promised to the lessor.*" 236 U.S. at 680 (emphasis added).

The State authorities then attempted to secure the same tax effect by levying a "leasehold tax" upon the lessee's leasehold interest in the property. According to the theories of defendants and the Supreme Court of Illinois in the case at bar, this Court should have upheld the tax on the ground

that a leasehold tax has no legal impact upon the lessor's charter exemption. Instead, this Court invalidated the tax as another attempt (through a change in form) to deny the benefits of the tax exemption. *Central of Georgia Ry. Co.* v. *Wright,* 248 U.S. 525 (1919). The Court stated:

> "[This case] presents another attempt to accomplish, by a change in form, what in *Wright* v. *Central of Georgia Ry. Co.,* 236 U.S. 674, was held to be an unconstitutional result. . . .
>
> ". . . The taxes now attempted to be levied are upon the leasehold interests of the lessee. . . . We are of the opinion that although the decision in the former case necessarily was confined to the question before the Court, the reasoning applies with equal force to that now before us." 248 U.S. at 526-27.

State courts confronted with the same situation have concluded that when a leasehold tax would frustrate the purpose for the lessor's exemption, the tax should not be permitted. *Hardy* v. *Inhabitants of Waltham,* 24 Mass. (7 Pick.) 108 (1828) (preventing impairment of the Harvard University Charter tax exemption by an attempted tax on Harvard's lessee); *Walter Reade, Inc.* v. *Township of Dennis,* 36 N.J. 435, 177 A.2d 752 (1962).

In reaching a contrary result, the majority's opinion in the Supreme Court of Illinois relied heavily upon *Jetton* v. *University of the South,* 208 U.S. 489 (1908). In that case, however, the language of the charter indicated that its purpose was not a subsidy but rather the creation of a buffer zone around the campus "to protect said institution and the students thereof from the intrusion of evil-minded persons who may settle near said institution." 208 U.S. at 491. The importance of this language to the decision is apparent from the examination of the portion of the *Jetton*

opinion quoted by the Supreme Court of Illinois in its opinion in this case. (See App. 7). The opinion in *Jetton* stated that if the exemption were "extended" to exempt the leasehold, the amount of rent the University would receive "would be larger" and the "extension" would "add value to the exemption." 208 U.S. at 501. In short, the Court in *Jetton* viewed exemption from the leasehold tax as a bonus to the lessor—a bonus not in any way essential to the purpose of the charter.

In contrast, the real estate tax funds from the leased properties have been the subject of all of the extensive prior litigation relating to the Northwestern exemption, and the imposition of the leasehold tax will effectively thwart the purpose of the exemption and deprive Northwestern of all benefits from the exemption. The inapplicability of the *Jetton* decision to the type of situation presented in the case at bar is further demonstrated by the fact that *Jetton* was relied upon by the dissenting opinion in the first *Central of Georgia* case and the fact that this Court in the second *Central of Georgia* case distinguished *Jetton* as "controlled by exceptional facts and language." (See the dissenting opinion below, distinguishing *Jetton;* App. 17).

A substantial federal question is presented as to the correctness of the Illinois Court's holding that the constitutional requirement of Article I, Section 10 can be avoided by a change in form and by the question of whether the *Central of Georgia* cases rather than the *Jetton* case should be regarded as controlling.

II. Even If the Burden of the Leasehold Tax Were Borne For Several Years by Northwestern's Lessees, The Tax Would Violate the Lessees' Rights to Equal Protection of the Laws.

As previously discussed, it is undisputed that the burden of the leasehold tax will fall upon Northwestern, either immediately (pursuant to pass-through clauses in the leases) or within a few years when the leases are subject to renegotiation. This violates Northwestern's charter.

However, as to any period when the burden of the leasehold tax is borne by Northwestern's lessees in the situation of Pepsi-Cola and Nabisco, the tax would violate the lessees' rights to equal protection of the laws. The leasehold tax places an extra burden upon Nabisco and Pepsi-Cola which is not borne by lessees of nonexempt lessors.

Under Section 26 of the Illinois Revenue Act, where there is no exemption of the fee interest, the lessor/property-owner pays all real estate taxes and his lessee pays no taxes. The leasehold tax, by its terms, is applicable only to real estate where the fee interest is exempt. Of course, rentals of nonexempt property are commonly assumed to include an amount which will reimburse the lessor for his real estate taxes or, in the case of a net lease, the lessee agrees to pay all taxes of the lessor.

In the case at bar, the allegations of appellants' complaints, which must be taken as true on this appeal, demonstrate that appellants already pay the same total rent as comparable lessees of nonexempt property. Since Northwestern pays no real estate taxes, this means that Northwestern obtains extra rentals in amounts which would

otherwise be paid as taxes. As we have already seen, these portions of the rent are in fact earmarked in the leases as "rent in lieu of taxes." Consequently, if the decision of the Supreme Court of Illinois were sustained and the tax could not be passed on to Northwestern, Nabisco and Pepsi-Cola would be required to pay not only the full market rent (including a rent in lieu of taxes equal to general real estate taxes) paid by all other lessees, but also a leasehold tax not imposed upon lessees generally.

The chart[6] below (based upon the statistics concerning rent and leasehold tax assessments of Pepsi-Cola which are part of the record) illustrates this invidious discrimination:

Type of Lessee	Base Rent Paid By Lessee	Taxes/ Tax Lieu Rent Paid By Lessee	Total Received By Lessor	Total Paid By Lessee
Lessee of Taxable Lessor (Net Lease)	$138,000	$ 87,000(1)	$138,000	$225,000
Pepsi-Cola, as Northwestern Lessee (under Appellants' theory)	$138,000	$ 87,000(2)	$225,000	$225,000
Pepsi-Cola, as Northwestern Lessee (under County's theory)	$138,000	$170,000(3)	$225,000	$308,000

(1) Taxes on property paid by lessee to County on lessor's behalf under net lease arrangement.

(2) Tax-lieu rent paid by lessee to Northwestern in an amount equivalent to taxes on property if lessor were taxable.

(3) $87,000 tax-lieu rent paid to Northwestern + $83,000 leasehold tax paid to County.

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[6] For purposes of clarity, the chart compares the property covered by the Pepsi-Cola lease with land owned by a nonexempt lessor which is leased on a "net lease" basis. A "net lease" is one in which the lessee pays the lessor's real estate taxes on top of a base rent. The chart utilizes the base rent and rent in lieu of taxes in the Northwestern and Pepsi-Cola lease and the amount of leasehold tax assessed against Pepsi-Cola in 1974. It assumes that the base rent and real estate taxes for the comparable nonexempt property would be at the same levels.

The effect of the Illinois leasehold tax statute, as construed by the Supreme Court of Illinois, is to set up a system of taxation which discriminates against Northwestern lessees and in favor of lessees of nonexempt property.

While the legislature may make classifications for tax purposes, the classifications must be reasonable. The equal protection clause of the Fourteenth Amendment prohibits subjecting a party to a tax not imposed on others similarly situated. *Hillsborough* v. *Cromwell*, 326 U.S. 620, 623 (1946).

This Court has applied the principle to strike down a leasehold tax on certain lessees where other lessees similarly situated were not subjected to the tax. *Phillips Chem. Co.* v. *Dumas Ind. School Dist.*, 361 U.S. 376 (1960). This Court stated:

> "Here, Phillips is taxed under Article 5248 on the full value of the real property which it leases from the Federal Government, while businesses with similar leases, using exempt property owned by the State and its political subdivisions, are not taxed on their leaseholds at all. The differences between the two classes, at least when the Government's interests are weighed in the balance, seem too impalpable to warrant such a gross differentiation. It follows that Article 5248, as applied in this case, discriminates unconstitutionally against the United States and its lessee." 361 U.S. at 387.

Defendants and the Supreme Court of Illinois relied upon *Trimble* v. *City of Seattle*, 231 U.S. 683 (1914) to sustain the leasehold tax. That case assumes, however, that a lessee of exempt property pays less rent than the lessee of nonexempt property because no real estate taxes are imposed on the exempt lessor. In the Pepsi-Cola example,

illustrated by the above chart, the *Trimble* Court would assume that if the lessee of nonexempt property paid $138,000 in base rent and $87,000 for his lessor's real estate taxes, the Northwestern lessee would pay a total rent of only $138,000—since his lessor had no real estate tax liability. Under those assumptions, of course, the imposition of a leasehold tax of $83,000 would roughly equalize the payments made by the two lessees.

But the allegations of the complaints in the case at bar (which must be accepted as true on this appeal) establish that these assumptions are inaccurate with respect to Northwestern lessees. Those lessees already pay Northwestern (as base rental and rent in lieu of taxes) as much rental as do lessees of similar nonexempt property. This circumstance is not accidental. It results from the charter-mandated practice that Northwestern fix rentals so as to afford Northwestern (and not its lessees) the benefit of its charter exemption from real estate taxes.

Consequently, whatever the record may have been in the cases relied upon by defendants, the record here demonstrates that imposing the burden of the leasehold tax upon the lessees results in a denial of equal protection of the laws.

CONCLUSION

For the reasons set forth in this Jurisdictional Statement, the federal questions presented by this appeal are substantial and of an importance which merits this Court's consideration. Consequently, we request that the Court note probable jurisdiction of this appeal and, upon plenary consideration of the appeal, reverse the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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Dated: February 21, 1978.

APPENDIX

APPENDIX 1

Judgment of the Supreme Court of Illinois

(No. 48251.—Reversed and remanded.)
(No. 48313.—Judgment affirmed.)

NABISCO, INC., Appellee, v. BERNARD KORZEN, County Treasurer, *et al.*, Appellants.—PEPSI-COLA GENERAL BOTTLERS, INC., Appellant, v. THOMAS TULLY, County Assessor, *et al.*, Appellees.

Opinion filed Sept. 20, 1977.
Rehearing denied Nov. 23, 1977.

MR. JUSTICE GOLDENHERSH delivered the opinion of the court:

In 1855 Northwestern University's corporate charter, granted in 1851, was amended to provide "That all property of whatever kind or description belonging to or owned by said corporation shall be forever free from taxation for any and all purposes." (1855 Ill. Laws 483, 484.) In earlier litigation (see *Northwestern University* v. *People ex rel. Miller*, 99 U.S. 309, 25 L. Ed. 387; *In re Assessment of Northwestern University*, 206 Ill. 64; *Northwestern University* v. *Hanberg*, 237 Ill. 185; and *People ex rel. County Collector* v. *Northwestern University*, 51 Ill.

2d 131) attacks on the exemption were rejected. These appeals arise out of the efforts of the taxing authorities of Cook County to assess and tax leasehold estates under the provisions of section 26 of the Revenue Act of 1939 (Ill. Rev. Stat. 1967, ch. 120, par. 507), which provides: "When real estate which is exempt from taxation is leased to another whose property is not exempt, and the leasing of which does not make the real estate taxable, the leasehold estate and the appurtenances shall be listed as the property of the lessee thereof, or his assignee, as real estate."

In cause No. 48251, Nabisco, Inc., in count III of its fourth amended complaint, sought to enjoin defendants, the County of Cook, its assessor, county clerk and treasurer, from assessing, levying or collecting $38,074.82 in 1974 taxes upon its leasehold estate in two parcels of real estate leased by Nabisco from Northwestern under leases, the initial terms of which expire in 1977 and 1978. In its complaint Nabisco alleged that Northwestern was chartered by the State of Illinois in 1851; that the terms of its charter authorized it to sell or lease its property but precluded it from holding more than 2,000 acres of land at one time, with the provision that any excess received by gift must be sold within 10 years; the 1855 amendment to the charter; that, as a result of decisions of this court and the United States Supreme Court construing its charter exemption, Northwestern has never paid taxes upon its real estate; that the university currently owns 434 acres of land, of which 71 are leased and the revenues used for educational purposes; that Nabisco's leases contain provisions authorizing the lessee to deduct from the rent paid Northwestern the amount of any taxes upon the real estate paid by the lessee, and that the aggregate amount lost to Northwestern if the tax here in question is sustained may

be $1,000,000 or more; that by their terms many of Northwestern's leases terminate within 20 years or at the will of the lessees, and that renegotiation of those leases will result in a rental reduced by the amount of tax, approximating $1,000,000, which the lessees must pay upon their leasehold interests if the levy of such taxes is sustained; that the leasehold tax attempted to be assessed pursuant to section 26 violates the equal protection guarantees of the Federal and State constitutions in that application of the leasehold tax against lessees of tax-exempt property without a similar application against lessees of non-tax-exempt property is arbitrary and discriminatory; that section 26 violates the uniformity requirements of article IX, section 4, of the Illinois Constitution of 1970; and that plaintiff has no adequate remedy at law. Count III concluded with a prayer for an injunction against assessing or collecting the taxes, and that section 26 be declared unconstitutional.

Upon allowance of Nabisco's motion for preliminary injunction the circuit court enjoined defendants from assessing, levying or collecting any tax on the leaseholds for the year 1974 "during the pendency of this litigation." Defendants appealed (58 Ill. 2d R. 307) and we allowed their motion to appeal directly to this court (58 Ill. 2d R. 302(b)).

In its complaint Pepsi-Cola General Bottlers, Inc., alleged that it was the lessee of real estate owned by Northwestern under a lease which "exclusive of option periods" expires in 1981; that the lease contained a clause reciting the tax-exempt status of the leased land and requiring lessee to pay as additional rent, in lieu of taxes, an amount agreed upon by the parties as representing the approximate amount which would be payable in taxes were

the property not exempt; that such amount was to be recomputed at the end of the first 10 years and every four years thereafter; that the additional rent claimed by Northwestern for 1974 in lieu of taxes was $87,150; that it has never been required to pay any real estate or other type of property tax since 1956, the inception date of the lease, but has always paid additional rent in lieu of such taxes; that in October 1973 it received from the assessor a notice of assessed valuation of the improvements on the land in the amount of $662,297, and in August 1974 received the 1973 tax bill in the amount of $83,498.10. Further alleging that the tax violates Northwestern's charter exemption and sections 97 and 104 of the Revenue Act of 1939 (Ill. Rev. Stat. 1973, ch. 120, pars. 578 and 585) relating to publication, notice and an opportunity to be heard prior to an increase in assessed values, is fraudulently excessive because based on the value of Northwestern's improvements rather than plaintiff's leasehold, denies due process and equal protection, and that there exists no adequate remedy at law, the complaint concluded with a prayer for a temporary and permanent injunction against any attempt to collect the tax.

The circuit court issued a temporary restraining order enjoining defendants from attempting to collect the 1973 taxes pending the further order of the court. Upon subsequent allowance of defendants' motion to dismiss, the circuit court dismissed the case but provided in its final order that the temporary injunction previously entered should remain in force pending disposition of the appeal. We allowed the joint motion of the parties for direct appeal (58 Ill. 2d R. 302(b)) and consolidated the cases for argument and opinion.

Although our earlier cases established that Northwestern's tax exemption constitutes a contract between the

State and the University which cannot be impaired by subsequent legislation imposing taxes upon its property whether that property be directly used for school purposes or leased to others and the proceeds used for school purposes, we have not heretofore considered the question whether a property tax assessed to the lessees under section 26, upon the value of their leasehold estates in property owned by Northwestern, is a constitutionally impermissible impairment of the contract.

We consider first defendants' contention that plaintiffs are not third-party beneficiaries of the charter contract entered into between Northwestern and the State, and are therefore without standing to challenge the tax upon their leasehold estates as being an unconstitutional impairment of Northwestern's contract. We do not agree. Whether the leasehold estates are taxable depends upon the scope of the tax exemption granted in the charter, and the right to pass on to Northwestern as lessor the amount of any taxes which they are called upon to pay is in dispute. Under these circumstances plaintiffs clearly have standing to invoke the charter exemption as a ground for holding the tax invalid. *Mutual Tobacco Co.* v. *Halpin,* 414 Ill. 226, 229.

Nabisco contends that the exemption to Northwestern is in the nature of "a broad subsidy exemption" and that therefore *La Salle County Manufacturing Co.* v. *City of Ottawa,* 16 Ill. 418, *Chicago* v. *University of Chicago,* 302 Ill. 455, *Goodyear Tire and Rubber Co.* v. *Tierney,* 411 Ill. 421, *cert. denied,* 344 U.S. 825, 97 L. Ed. 642, 73 S. Ct. 24, and *People ex rel. Korzen* v. *American Airlines,* 39 Ill. 2d 11, which upheld the taxation of leasehold interests in land owned by governmental bodies are distinguishable. We do not agree. The leading case of *Jetton* v. *University of the South,* 208 U.S. 489, 52 L. Ed. 584, 28 S. Ct. 375,

presented a factual situation similar to this case. The charter granted by the State of Tennessee authorized the University of the South to own 10,000 acres of land "one thousand of which, including buildings and other effects and property of said corporation, shall be exempt from taxation as long as said lands belong to said university." The university leased some of its exempt land and the county taxing official sought to tax the leasehold interest of one lessee, and announced the intent to tax "all lessees similarly situated." In holding the leasehold interest was not exempt from taxation, the Supreme Court stated the rule, as follows:

> "As long as different interests may exist in the same land, we think it plain that an exemption granted to the owner of the land in fee does not extend to an exemption from taxation of an interest in the same land, granted by the owner of the fee to another person as a lessee for a term of years. The two interests are totally distinct, and the exemption of one from taxation plainly does not thereby exempt the other." 208 U.S. 489, 500, 52 L. Ed. 584, 589, 28 S. Ct. 375, 377.

Plaintiffs argue that *Jetton* is distinguishable in that the purpose of Northwestern's charter tax exemption is to subsidize the university (see *People ex rel. County Collector* v. *Northwestern University*, 51 Ill. 2d 131), while the purpose of the charter tax exemption of 1,000 acres to the University of the South was "to protect said institution and the students thereof from the intrusion of evil-minded persons who may settle near said institution" and to "maintain a buffer zone around the campus." They argue, too, that the taxation of the leasehold interest of the lessee of the University of the South "did not interfere with the purpose of the charter." The court did not rest its decision in *Jetton* on the ground that taxing the university's lessee would not interfere with the purpose of the

charter. The rationale of the decision is that unless the consent of the legislature is given in clear and unmistakable terms the exemption of the fee from taxation does not serve to exempt the leasehold. Furthermore, the court treated the exemption as a "subsidy exemption" and rejected the argument which plaintiffs here advance, that the taxing of the leasehold interest diminished the university's income from the leased property and, therefore, impaired the exemption contract. The court said:

> "If the university could lease its lands and could also effectually provide that the interest of the lessee in the land so leased should be exempt from taxation, it may readily be seen that the amount of rent which it would receive would be larger than if no such exemption could be obtained, but that is a matter which is wholly immaterial upon the question of the impairment of the contract of exemption that was really made. That contract cannot be extended simply because it would, as so construed, add value to the exemption. The language used does not include the exemption claimed." 208 U.S. 489, 501, 52 L. Ed. 584, 589, 28 S. Ct. 375, 378.

Plaintiffs argue that in *Wright* v. *Central of Georgia Ry. Co.*, 236 U.S. 674, 59 L. Ed. 781, 35 S. Ct. 471, and *Central of Georgia Ry. Co.* v. *Wright*, 248 U.S. 525, 63 L. Ed. 401, 39 S. Ct. 181, the Supreme Court did not follow *Jetton* and rejected efforts to diminish charter tax exemptions by subjecting leased property to an *ad valorem* tax assessed against the lessee as owner. It is not necessary to detail the unique facts and statutes involved in the two *Central of Georgia* cases. The Supreme Court construed the Georgia statute to intend that the railroads to whom the charters were granted could derive their operating revenues "by doing the whole business, by letting in others to share a part of it, or by making a lease of the whole." (236 U.S. 674, 679, 59 L. Ed. 781, 784, 35 S. Ct. 471, 472.)

In the second *Central of Georgia* case, which merely adopted the holding of the first case, the court referred to *Jetton* with approval and stated that it was not controlling because "of the exceptional facts and language that had to be considered" in the first case. In *Morris Canal & Banking Co.* v. *Baird,* 239 U.S. 126, 60 L. Ed. 177, 36 S. Ct. 28, the court stated that the holdings in the *Central of Georgia* cases were based upon the terms of the charters "which were interpreted as contemplating and permitting subsequent transfers without subjecting the fee to taxation." 239 U.S. 126, 132, 60 L. Ed. 177, 181, 36 S. Ct. 28, 30.

Plaintiffs also rely on *State Toll Highway Com.* v. *Korzen,* 32 Ill. 2d 338, wherein it was held that Standard Oil Company was exempt from the leasehold tax on property leased from the Commission and used in the operation of service stations and restaurants along the tollway. As in the *Central of Georgia* cases, based on the special facts and legislation, the court found that the General Assembly intended that such leasehold interest be exempt. The special facts were that the proximity of the facilities for gasoline, food and other necessities of travel promoted the objectives of limited access and safety of travel; that service stations and restaurants are an integral part of the toll road system, whether they be operated by the Commission or leased to a private corporation which may be better able to carry on the business, thus bringing about the desired result; that the General Assembly had given the Commission the authority to render this public service itself or to lease land to a private corporation to render the public service and that the General Assembly could not have intended to make the first choice tax exempt and burden the second with a tax which would ultimately be borne by the Commission. The court said: "It is unnecessary to discuss individually the authorities cited by

defendants. They are all distinguishable by the character of the lessees' operations. In each case the business conducted was of a purely private nature, having no connection with the public function performed by the body from which the land was leased." (32 Ill. 2d 338, 341-42. See also *Martin* v. *Borough of Collingswood* (1962), 36 N.J. 447, 177 A.2d 759.) We note too that in *People* v. *International Salt Co.,* 233 Ill. 223, the court held valid a tax on the lessee's interest in property owned by the Illinois Central Railroad, whose property, under its charter, was exempt from taxation.

We hold that Northwestern's charter tax exemption does not proscribe the taxing of plaintiffs' leasehold estates as real estate under section 26 of the Revenue Act of 1939. *Jetton* v. *University of the South,* 208 U.S. 489, 52 L. Ed. 584, 28 S. Ct. 375; *People* v. *International Salt Co.,* 233 Ill. 223.

Nabisco maintains that to impose the leasehold tax will violate its right to equal protection. It argues that it already pays Northwestern rent equal to a fair market rental, which includes an amount which but for the university's exemption it would pay as taxes, and that to require it to pay an additional amount as taxes on its leasehold would force it to pay more than a lessee of comparable taxable property. The validity of its argument is diminished by the fact that it alleges in its complaint that under the terms of its leases it is authorized to deduct from its rental payments the amount of any real estate taxes it may be required to pay on its leasehold interest. In *Trimble* v. *City of Seattle,* 231 U.S. 683, 58 L. Ed. 435, 34 S. Ct. 210, the Supreme Court held that there was no violation of equal protection when a leasehold tax was assessed only against lessees of tax-exempt State land. The court said:

> "It is urged that to deny the state's obligation [not to tax its lessees] discriminates unconstitutionally against this class of lessees, since all others are free from the burden. But that is not true. Whether landlord or tenant shall pay a tax is a matter of private arrangement, and the practice one way or the other has no bearing on the matter. The argument from inequality really works the other way. If these leaseholds are not taxable, they are a favored class of property; for ordinarily leaseholds are taxed even if they are lumped and included in the value of the fee." 231 U.S. 683, 689-90, 58 L. Ed. 435, 438-39, 34 S. Ct. 218, 219.

As was stated in *Titus* v. *Texas Co.*, 55 Ill. 2d 437, 442, "differential treatment for purposes of taxation can withstand constitutional attack so long as the classifications are reasonable." We do not find that the distinction between lessees of tax exempt property and lessees of taxable property, whereby a tax on the leasehold is imposed on the former, results in an unreasonable classification.

In its *amicus* brief Northwestern contends that "The real issue in this case * * * is whether Section 26 of the Revenue Act * * * may be applied * * * to tax a lessee for property which belongs not to the lessee but to the lessor, the owner of the fee." Simply stated, its position is that the lessees' interests may indeed be taxed, but that the only valuation, for assessment purposes, which may be placed on a leasehold estate is that which results in the appreciation of its value. In view of the conclusions reached we need not further consider its arguments.

In its *amicus curiae* brief Lake Forest College urges that if we find the leasehold estates under consideration to be taxable, we make our ruling prospective in application and not retroactive as to existing leases. We have limited the retroactive effect of a decision to those situations

where a change in the law would impose undue hardship upon those who had relied upon the prior law. (See, *e.g.*, *Molitor* v. *Kaneland Community Unit District No. 302*, 18 Ill. 2d 11.) Where no change in prior Illinois law is effected by the decision we have refused to limit its retroactive application. (*Baier* v. *State Farm Insurance Co.*, 66 Ill. 2d 119.) Lake Forest, while conceding that the limiting of the retroactive effect of a decision has been confined to those cases in which a prior decision is overruled, argues that the "state of the law under which such leaseholds could in no way have fairly been foreseen as taxable prior to a decision of this court" requires a different result. We do not agree.

In the 1952 University of Illinois Law Forum, the following statement appears:

> "Another type of real estate that is assessable is created where the owner of land that is exempt because of ownership regardless of use leases it. This includes in addition to state and school land, land owned by many corporations created by special acts granting such exemption passed prior to our present Constitution. The best known of these are probably the Illinois Central Railroad and Northwestern University. Such leaseholds are assessable. [Ill. Rev. Stat., ch. 120, secs. 501(2), 507 (1951).] The few cases that have arisen seem to have caused little difficulty. [*See* Carrington v. People, 195 Ill. 484, 63 N.E. 163 (1902) (involving a leasehold of State-owned lands), and People v. International Salt Co., 233 Ill. 223, 84 N.E. 278 (1908) (involving a leasehold of Ill. Central R.R. right of way lands).]" (Footnotes in brackets.) (Gale, *Assessment and Collection of Taxes*, 1952 U. Ill. L.F. 192, 195. See also *Annot., Availability of Tax Exemption to Property Held on Lease from Exempt Owner*, 54 A.L.R.3d 402 (1973).)

The fact that Nabisco's leases provide for the deduction from the rent of any taxes paid by the lessee and Pepsi-

Cola's lease provides for rental in lieu of taxes leads us to conclude that both plaintiffs foresaw the strong possibility that their leasehold estates would be subjected to taxation under section 26 of the Revenue Act of 1939.

For the foregoing reasons, the judgment of the circuit court in cause No. 48313 is affirmed and the order of the circuit court of Cook County in cause No. 48251 is reversed and the cause is remanded for further proceedings consistent with the views expressed herein.

48251 — Reversed and remanded.
48313 — Judgment affirmed.

MR. JUSTICE MORAN took no part in the consideration or decision of this case.

MR. JUSTICE UNDERWOOD, dissenting:

Until the filing of the majority opinion in these consolidated cases this court had consistently maintained the integrity of the 1855 guarantee by the State of Illinois to Northwestern University "That all property of whatever kind or description belonging to or owned by said corporation shall be forever free from taxation for any and all purposes." (1855 Ill. Laws 483, sec. 4.) (*Northwestern University* v. *People ex rel. Miller* (1875), 80 Ill. 333, *rev'd* (1879), 99 U.S. 309, 25 L. Ed. 387; *In re Assessment of Northwestern University* (1903), 206 Ill. 64; *Northwestern University* v. *Hanberg* (1908), 237 Ill. 185; *People ex rel. County Collector* v. *Northwestern University* (1972), 51 Ill. 2d 131; *cert. denied* (1972), 409 U.S. 852, 34 L.Ed. 2d 95, 93 S. Ct. 65; *Dee-El Garage, Inc.* v. *Korzen* (1972), 53 Ill. 2d 1.) The net effect of today's opinion, as I understand it, is to nullify that exemption as to property owned by Northwestern and leased to others even though the income therefrom is used for educational purposes.

Northwestern's tax exemption is one of the few remaining broad, subsidy-type exemptions possible only under our 1848 constitution. Its history was described in some detail in *People ex rel. County Collector* v. *Northwestern University* (1972), 51 Ill. 2d 131, 134-36:

> "* * * Viewed from today's perspective, the charter tax exemption of Northwestern University is highly unusual. But as of the date when the tax exemption was enacted as a means of inducing donations to the institution, the tax exemption was not at all unusual. The public interest in higher education was recognized in the early days of the State, but at that time the recognition took the form of special charters authorizing the incorporation of particular educational institutions. The charters contained tax exemptions, the terms of which varied, apparently in accordance with the inducement thought necessary to bring about contributions to establish and maintain the institutions. Some of the variations are set forth in this court's opinion in *People ex rel. Gill* v. *Lake Forest University* (1937), 367 Ill. 103.
>
> Prior to the adoption of the constitution of 1870, a large number of corporate charters had been granted by the legislature to private educational institutions. There were more than 80 such charters which contained some provision for tax exemption. Only a relatively small number of these institutions have survived. * * *
>
> With the adoption of the constitution of 1870 the situation changed dramatically. That constitution prohibited the legislature from granting to any corporation any special privilege (art. IV, sec. 22), and with respect to exemption from taxation provided that such 'property as may be used exclusively for * * * school * * * purposes, may be exempted from taxation; but such exemption shall be only by general law.' (Art. IX, sec. 3.) And by general law the legislature exempted only that property of schools which was used

exclusively for school purposes, and not leased or otherwise used with a view to profit.

Educational institutions established subsequent to 1870 therefore do not enjoy the same kind of tax exemption that is enjoyed by Northwestern University. That fact, however, does not impair the validity of Northwestern's charter provision. As this court stated in 1908: 'The changed conditions with which the university is now surrounded cannot affect the meaning of the amendment passed in 1855. Doubtless the legislature did not foresee the enormous growth of the city of Chicago, the increase in the value of property, the growth in the wealth, and the work, the wants and necessities of the university. The university was not then regarded as an incubus on the community. Schools of higher learning were scarce, and the legislature which granted this exemption to Northwestern University granted to various other schools perpetual exemption from taxation of all the property they should ever acquire. (Private Laws of 1855, pp. 380, 384, 503, 511, 513.) Even now the legislature appropriates yearly for the University of Illinois, from money raised by taxation, sums vastly greater than those released to the Northwestern University through this exemption.' *Northwestern University* v. *Hanberg* (1908), 237 Ill. 185, 191-2."

Our earlier cases establish, as the majority concedes, that Northwestern's tax exemption constitutes a contract between the State and the university, the obligation of which cannot be impaired by subsequent legislation imposing taxes upon its property, whether that property be directly and physically used for school purposes or leased to others and the proceeds of the leases used for those purposes. (*Miller; Hanberg; People ex rel. County Collector* v. *Northwestern University.*) In fact, this court's original interpretation narrowly limiting the scope of the exemption to that property used directly and physically for school purposes was reversed by the United States Supreme Court.

(*Northwestern University* v. *People ex rel. Miller* (1875), 80 Ill. 333, *rev'd* (1879), 99 U.S. 309, 25 L. Ed. 387.) In its opinion the court stressed: "The purpose of a college or university is to give youth an education. The money which comes from the sale or rent of land dedicated to that object aids this purpose." (99 U.S. 309, 324, 25 L. Ed. 387, 390.) The court then held the leasing of its land to others did not destroy Northwestern's exemption.

In discussing the effect of the taxes here in question defendants concede that sustaining the tax will result in a reduction in Northwestern's income from its leased property by compelling the university, depending on the interpretation of its lease clauses, to reimburse its lessees for taxes paid, forego its right to the additional rent it now receives in lieu of taxes, or accept a lower rental when its leases must be renegotiated. The allegations by plaintiffs and Northwestern that these immediate or ultimate losses of income resulting from imposition of the tax will exceed $1,000,000 are not contradicted.

It is important in the consideration of this case to note that the leasehold tax in question is a substantial one levied and computed under sections 20(2) and 26 of the Revenue Act. The former provides that "Each taxable leasehold estate shall be valued at its fair cash value." (Ill. Rev. Stat. 1973, ch. 120, par. 501(2).) In *People ex rel. Korzen* v. *American Airlines, Inc.* (1967), 39 Ill. 2d 11, this court considered the method to be used in computing the fair cash value of a leasehold taxable under section 26. The tax had there been levied upon the leasehold interest of American in hangar facilities and a site at Chicago-owned O'Hare Airport. Since the property owned by the city was exempt, the airline contended its leasehold was exempt from the tax under the earlier opinion of this court in *Illinois State Toll Highway Com.* v. *Korzen* (1965),

32 Ill. 2d 338. This court held, however, that *Toll Highway* was not controlling since in that case the burden of the tax would have fallen upon the tax-exempt lessor in the form of reduced rentals whereas in *American Airlines* the likelihood of appreciably reduced rental income to the tax-exempt lessor was "extremely remote." (39 Ill. 2d 11, 15.) Consequently, the court held American's leasehold interest taxable. In determining the proper basis for valuing that interest the court expressly rejected the argument that the tax base should be the incremental value—the amount which a third party would be willing to pay the lessee, in addition to assuming the rental obligation, for an assignment of the lease. It is entirely clear from *American Airlines* (39 Ill. 2d 11, 18-19) and *Dee-El Garage* (53 Ill. 2d 1, 5) that the leasehold tax to be levied under sections 20 and 26 of the Revenue Act is not to be measured merely by incremental or potential profit value. Rather, the fair cash value of that leasehold is determined by multiplying the current rental value of the property by the present value of an annual payment of one dollar during the remaining term of the lease. While, obviously, the fair cash value upon which the tax is to be assessed will depend on the unexpired term of the lease, the very real nature of the resulting burden to the lessor emanating from reduced rentals is demonstrated by *American Airlines* and by the tax bills in this case.

Northwestern's lease with Pepsi-Cola expressly requires payment by the lessee of "tax-lieu rent"—an amount, agreed upon by the parties at four-year intervals, representing the approximate amount which would be payable in taxes were the property not exempt. For 1974 the amount of "tax-lieu rent" claimed by Northwestern was $87,150. The tax bill received by Pepsi in August of that year, for 1973 taxes, was $83,498.10. Quite clearly demonstrated is the fact that taxation of this leasehold interest

is, for all practical purposes, the equivalent of taxing Northwestern upon its exempt fee interest, thus, as to this leased property, effectively nullifying its exemption. The university will no longer receive "tax-lieu rent" from Pepsi-Cola, and Nabisco will deduct its taxes from rental payments. This subversion of Northwestern's exemption is, in my judgment, a clear impairment of its charter contract in violation of section 10 of article I of the Constitution of the United States.

In nullifying, as to leased property, the benefits of Northwestern's exemption the majority relies upon *Jetton* v. *University of the South* (1908), 208 U.S. 489, 52 L. Ed. 584, 28 S. Ct. 375. In that case the Supreme Court upheld a tax upon the leasehold interest of a lessee of land owned by the University of the South under a charter exempting that land from taxation "as long as said lands belong to said university." Such authority as *Jetton* might have been, however, was severely diluted by the later case of *Wright* v. *Central of Georgia Ry. Co.* (1915), 236 U.S. 674, 59 L. Ed. 781, 35 S. Ct. 471, in which the majority of that court struck down a tax upon the lessee of railroad property exempted by the State of Georgia from taxation. The diminution in *Jetton's* stature is further emphasized since the dissenting opinion in *Wright* relied upon it, and by the further fact that in *Central of Georgia Ry. Co.* v. *Wright* (1919), 248 U.S. 525, 527, 63 L. Ed. 401, 404, 39 S. Ct. 181 (the second Central of Georgia case), the court adhered to its original view, distinguishing *Jetton* as controlled by "exceptional facts and language." *People* v. *International Salt Co.* (1908), 233 Ill. 223, also relied upon in the majority opinion, construes without discussion an earlier leasehold-taxing statute to permit a tax upon the leasehold interests in otherwise exempt property. That opinion contains no indication as to the manner in which the value of the lessee's interest was to be determined, and

it may have been assessed upon an incremental value which the plaintiffs, Northwestern and I agree would be taxable here. Consequently, I do not regard *International Salt* as persuasive here. The majority also views the presence of tax-protection clauses in plaintiffs' leases as indicating their expectation of taxation of their leasehold interest, but the presence of such clauses seems to me only the normal action of any prudent lessee. And, in any event, the existence for more than a century of statutory provisions similar to section 26 (1853 Ill. Laws 39, sec. 5) without their application in the manner now attempted would seem to be some indication of the opinion of taxing authorities regarding their applicability to Northwestern's lessees.

In my judgment the other authorities cited by defendants and the majority are not persuasive, for they are largely concerned with either the "use" type of exemption incorporated in our 1870 constitution limiting the scope of an exemption to property used exclusively for the exempt purpose, or with "governmental" exemptions in which the exemption attaches only so long as the property is used by agencies of the government. In both of those instances, of course, a lease of the land for a nonexempt use violates the "exclusive use" requirement. The opinions which do not fall in either of these categories simply do not discuss the exemption issue.

Some leasehold interests in otherwise exempt property may, of course, be taxed separate and apart from the exempt fee, as *American Airlines* and our earlier opinions clearly establish. But those cases have not involved exemptions of the character present here. The thrust of the earlier decisions by this court and the Supreme Court in the prior Northwestern cases has been that the university enjoys one of the few remaining broad exemptions from property taxation of a type possible only under our pre-

1870 constitution. That exemption was originally granted by a young and growing State as part of its policy to encourage the establishment and maintenance by private persons of needed institutions of higher education. As a direct result Northwestern now receives from its leased properties and devotes to its educational purposes substantial amounts of additional rent approximating the amount of taxes which would be payable were it not for the charter exemption. Sustaining the leasehold tax on the lessee's interests in that property, as *American Airlines* holds the value of that interest must be computed, will significantly reduce Northwestern's rental income. Considering the fact that the leasehold tax, as assessed, closely parallels the amount of general real estate taxes collectible on nonexempt property, the practical result is to shift to Northwestern the burden of the tax in disregard of our *Toll Highway* decision. It is also apparent that in the situation Lake Forest finds itself—with the rent from the leased property only slightly more than the leasehold taxes—its exemption has virtually been converted to a "use" exemption so far as its value to the college is concerned—a result which the Supreme Court in *Miller* expressly precluded. Likewise the inevitable and significant reduction in rental income impairs Northwestern's charter contract in what I believe to be a violation of section 10 of article I of the Constitution of the United States. As Mr. Justice Holmes wrote in the first *Central of Georgia* case, "the protection of the lessee being necessary in order to make good that promised to the lessor" (236 U.S. 674, 680, 59 L. Ed. 781, 785, 35 S. Ct. 471, 472), I would hold that the section 26 leasehold tax, as this court has held it must be computed, cannot be imposed upon the plaintiffs herein.

MR. JUSTICE RYAN joins in this dissent.

APPENDIX 2

Preliminary Injunction Order, dated December 23, 1975

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

NABISCO, INC.,	)	
Plaintiff,	)	
v.	)	
	)	NO. 74 CH 7702
BERNARD KORZEN, Cook County	)	
Treasurer and Ex-Officio	)	
Collector; P. J. CULLERTON,	)	
Assessor of Cook County;	)	
STANLEY KUSPER, Clerk of	)	
Cook County, Illinois, and	)	
COOK COUNTY, ILLINOIS,	)	
Defendants.	)	

ORDER

This cause having come on to be heard on the Motion for Preliminary Injunction heretofore filed by the plaintiff herein, the Court having heard arguments of counsel, due and proper notice having been given and the Court being fully advised in the premises,

NOW, THEREFORE, the Court hereby finds:

A. The Court has jurisdiction of the subject matter of this cause and of the parties hereto.

B. The defendants herein are charged with and are attempting to impose, assess and collect taxes for the year 1974 against plaintiff's leasehold interests in property they leased from Northwestern University. Unless defendants are preliminarily enjoined from attempting to assess

back taxes against plaintiff's property, and from attempting to collect said back taxes, the defendants will attempt to sell plaintiff's property to satisfy the liens which would be created by the assessment of said back tax.

C. If a preliminary injunction is not entered herein to preserve the *status quo* and protect the interests of plaintiff in this cause by temporarily preventing defendants from causing plaintiff's properties to be listed or adjudged as delinquent or sold for failure to pay the purported back taxes which are the subject of this proceeding, then the owners of such properties will suffer immediate and irreparable harm by reason of such listing, adjudication or sale and the resulting loss of their property or cloud of title thereon.

IT IS, THEREFORE, HEREBY ORDERED, ADJUDICATED AND DECREED by the Court as follows:

1. That the defendants and each of them shall be preliminarily restrained and enjoined during the pendency of this litigation from assessing, imposing or levying against, or collecting, or attempting to assess, impose or levy against, or to collect from, the plaintiff, or any of them, any taxes for the year 1974 with respect to the real estate located at 1305 Gardner Road, Broadview, Illinois or at 255 E. 167th Street, Harvey, Illinois which plaintiff leases from Northwestern University and from assessing, imposing or levying against, or collecting or attempting to assess, impose or levy against, or to collect from plaintiff any tax for 1974.

2. That the defendants and each of them shall be preliminarily restrained and enjoined during the pendency of this litigation from doing any acts or engaging in, or attempting to do any acts or to engage in any acts in, or

in connection with the listing as delinquent any taxes which may be extended pursuant to the tax bills relating to said leasehold properties for the year 1974 or from selling or attempting to sell any of said leasehold properties because said taxes for said year have not been paid.

3. Plaintiff shall be required to post a $5,000 cost bond within 10 days hereof.

ENTER:

/s/ F. E. Morrissey
Judge

APPENDIX 3

Final Order, dated July 21, 1975

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

PEPSI-COLA GENERAL BOTTLERS, INC., *Plaintiff*,	)	
vs.	)	No. 74 CH 7618
THOMAS TULLY, County Assessor, et al., *Defendants.*	)	

FINAL ORDER

This cause having come on to be heard on defendants' motion to strike and dismiss plaintiff's Complaint In Chancery For An Injunction And Other Relief, the Court having jurisdiction of the cause and having duly considered said motion and the arguments of counsel and memoranda of law having been submitted by the parties hereto, and the Court now being fully advised in the premises and having found that the plaintiff's Complaint In Chancery For An Injunction And Other Relief fails to state a cause of action for which relief can be granted,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

That defendants' motion to strike and dismiss plaintiff's Complaint In Chancery For An Injunction And Other Relief be and is hereby sustained, and said Complaint of the plaintiff be and is hereby stricken and dismissed without leave to amend, and plaintiff shall go hence without day and take nothing from this action.

It is further ordered that for the next 30 days the injunction heretofore entered shall remain in force and effect together with the bond previously posted herein by plaintiff. If plaintiff files notice of appeal herein said injunction shall remain in force together with the bond previously posted herein pending further order of the Appellate Court. If no appeal is filed within the next 30 days, the injunction previously entered herein shall be dissolved and without effect for any and all purposes.

ENTER:

/s/ Judge Francis T. Delaney

APPENDIX 4

Order Denying Rehearing, dated November 23, 1977

Supreme Court of Illinois

NABISCO, INC., et al., etc., et al., Appellees		
Nos. 48251, 48313 Cons.	vs.	Appeal from Circuit Court Cook County 74 CH 7702 74 CH 7618
BERNARD KORZEN, former Cook County Treasurer, etc., et al., Appellants		

And now, on this day, the Court having duly considered the petitions for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of said petitions and denies a rehearing in this cause.

APPENDIX 5

Notice of Appeal, dated February 14, 1978

IN THE

SUPREME COURT OF ILLINOIS

NABISCO, INC., *Plaintiff-Appellee,* v. BERNARD KORZEN, et al., *Defendants-Appellants.*	)	No. 48251
PEPSI-COLA GENERAL BOTTLERS, INC., *Plaintiff-Appellant,* v. THOMAS TULLY, et al., *Defendants-Appellees.*	)	No. 48313

NOTICE OF APPEAL
TO THE
SUPREME COURT OF THE UNITED STATES

1. Notice is hereby given that Nabisco, Inc., and Pepsi-Cola General Bottlers, Inc. appeal to the Supreme Court of the United States from the judgment entered in this case on September 20, 1977. Nabisco and Pepsi-Cola's timely petitions for rehearing were denied on November 23, 1977.

2. The Court's September 20, 1977 judgment held (1) that Section 26 of the Illinois Revenue Act does not impair the Charter Contract of Northwestern University in violation of Article I, clause 10 of the Constitution of the

United States, and (2) that Section 26 of the Illinois Revenue Act does not violate the right to equal protection of lessees of tax exempt lessors in violation of the Fourteenth Amendment to the Constitution of the United States. Accordingly, this appeal is taken pursuant to 28 U.S.C. §1257(2).

3. The Clerk of the Supreme Court of Illinois is requested to certify a complete transcript of the entire record in this case and to provide for its transmission to the Clerk of the Supreme Court of the United States, Washington, D.C. 20543, in accordance with Rule 12 of the Rules of that Court.

NABISCO, INC.
By */s/ Keith F. Bode*
One of its attorneys

Keith F. Bode
Robert C. Keck, Jr.
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PEPSI-COLA GENERAL BOTTLERS, INC.
By */s/ Aaron J. Kramer*
One of its attorneys

James B. Wilson
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Dated: February 14, 1978.

APPENDIX 6

Corporate Charter of Northwestern University, enacted 1851, as amended 1855

AN ACT to incorporate the North-western University.

SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly*, That Richard Haney, Philo Judson, S. P. Keys and A. E. Phelps, and such persons as shall be appointed by the Rock River Annual Conference of the Methodist Episcopal Church to succeed them in said office; Henry Summers, Elihu Springer, David Brooks and Elmore Yocum, and such persons as shall be appointed by the Wisconsin Annual Conference of said church to succeed them; four individuals, if chosen, and such persons as shall be appointed to succeed them by the Michigan Annual Conference of said church; four individuals, if chosen, and such persons as shall be appointed to succeed them, by the North Indiana Annual Conference of said church; H. W. Rued, J. J. Steward, D. N. Smith and George W. Geas, and such persons as shall be appointed to succeed them by the Iowa Annual Conference of said church; four individuals, if chosen, and such persons as shall be appointed to succeed them by the Illinois Annual Conference of said church; A. S. Sherman, Grant Goodrich, Andrew J. Brown, John Evans, Orrington Lunt, J. K. Botsford, Joseph Kitterstring, George F. Foster, Eri Reynolds, John M. Arnold, Absalom Funk and E. B. Kingsley, and such persons, citizens of Chicago or its vicinity, as shall be appointed by the board of trustees hereby constituted to succeed them, be and they are hereby created and constituted a body politic and corporate under the name and style of the "Trustees of the North-western University," and henceforth shall be styled and known by that name, and by that name and style to remain and have perpetual succession, with power to sue and be sued, plead and be impleaded; to acquire hold and convey property, real, personal or mixed, in all lawful ways, to have and use a common seal, and to alter the same at pleasure; to make and alter from time to time such by-laws as they may deem necessary for the government of said institution, its officers and servants: *Provided*, such by-laws are not inconsistent with the constitution and laws of this state, and of the United States—and to confer on such persons as may be considered worthy of such academical or honorary degrees as are usually conferred by similar institutions.

§ 2. The term of office of said trustees shall be four years, but that of one member of the board for each conference enjoying the appointing power by this act, and term of three of the members whose successors are to be appointed by the board hereby constituted, shall expire annually; the term of each member of the board herein named to be fixed by lot at the first meeting of said board, which board shall, in manner above specified, have perpetual succession, and shall hold the property of said institution solely for the purposes of education, and not as a stock for the individual benefit of themselves or any contributor to the endowment of the same; and no particular religious faith shall be required of those who become students of the institution. Nine members shall constitute a quorum for the transaction of any business of the board, except the appointment of president or professor, or the establishment of chairs in said institution, and the enactment of by-laws for its government, for which the presence of a majority of the board shall be necessary.

§ 3. Said annual conference of the Methodist Episcopal Church, under whose control and patronage said university is placed, shall each also have the right to appoint, annually, two suitable persons, members of their own body,

visiters to said university, who shall attend the examination of students, and be entitled to participate in the deliberations of the board of trustees, and enjoy all the privileges of members of said board, except the right to vote.

§ 4. Said institution shall remain located in or near the city of Chicago, Cook county; and the corporators and their successors shall be competent in law or equity to take to themselves, in their said corporate name, real, personal or mixed estate, by gift, grant, bargain and sale, conveyance, will, devise or bequest, of any person or persons whomsoever; and the same estate, whether real, personal or mixed, to grant, bargain, sell, convey, devise, let, place out at interest, or otherwise dispose of the same, for the use of said institution, in such manner as to them shall seem most beneficial to said institution. Said corporators shall faithfully apply all the funds collected, or the proceeds of the property belonging to the said institution, according to their best judgment, in erecting and completing suitable buildings, supporting necessary officers, instructors and servants, and procuring books, maps, charts, globes and philosophical, chemical and other apparatus necessary to the success of the institution, and do all other acts usually performed by similar institutions that may be deemed necessary or useful to the success of said institution, under the restrictions herein imposed: *Provided, nevertheless,* that in case any donation, devise or bequest shall be made for particular purposes accordant with the design of the institution, and the corporation shall accept the same, every such donation, devise or bequest shall be applied in conformity with the express conditions of the donor or devisor: *Provided, further,* that said corporation shall not be allowed to hold more than two thousand acres of land at any one time, unless the said corporation shall have received the same by gift, grant or devise; and in such case they shall be required to sell or dispose of the same within ten years from the time they shall acquire such title, and on failure to do so, such land, over and above the before named two thousand acres, shall revert to the original donor, grantor, devisor, or their heirs.

§ 5. The treasurer of the institution, and all other agents, when required, before entering upon the duties of their appointment, shall give bond for the security of the corporation, in such penal sums and with such securities as the corporators shall approve; and all process against the corporation shall be by summons, and the service of the same shall be by leaving an attested copy thereof with the treasurer, at least sixty days before the return day thereof.

§ 6. The corporation shall have power to employ and appoint a president or principal for said institution, and all such professors or teachers, and all such servants as may be necessary, and shall have power to displace any or such of them as the interest of the institution may require: to fill vacancies which may happen by death, resignation or otherwise among said officers and servants; and to prescribe and direct the course of studies to be pursued in said institution.

§ 7. The corporation shall have power to establish departments for the study of any and all the learned and liberal professions in the same, to confer the degrees of doctor in the learned arts and sciences and *belle lettres,* and to confer such other academical degrees as are usually conferred by the most learned institutions.

§ 8. Said corporation shall have power to institute a board of competent persons, always including the faculty, who shall examine such individuals as may apply, and if such applicants are found to possess such knowledge pursued in said institution as in the judgment of said board

renders them worthy, they may be considered graduates in course, and shall be entitled to diplomas accordingly, on paying such fee as the corporation shall affix; which fee, however, shall in no case exceed the tuition bills of the full course of studies in said institution. Said examining board may not exceed the number of ten, three of whom may transact business, provided one be of the faculty.

§ 9. Should the corporation at any time act contrary to the provisions of this charter, or fail to comply with the same, upon complaint being made to the circuit court of Cook county, a *scire facias* shall issue, and the circuit attorney shall prosecute, in behalf of the people of this state, for forfeiture of this charter. This act shall be a public act, and shall be construed liberally in all courts, for the purposes herein expressed.

Approved Jan. 28, 1851.

AN ACT to amend an act entitled "An act to incorporate the Northwestern University," approved January 28th, 1851.

Section 1. *Be it enacted by the people of the state of Illinois, represented in the General Assembly,* That John L. Smith, Aaron Wood, Luther Taylor and William Graham and such persons as shall be elected to succeed them by the Northwestern Indiana Conference of the Methodist Episcopal Church be and they are hereby constituted members of the board of trustees of the Northwestern University.

§ 2. No spiritous, vinous or fermented liquors shall be sold under license or otherwise within four miles of the location of said university, except for medicinal, mechanical or sacramental purposes, under a penalty of twenty-five dollars for each offense, to be recovered before any justice

of the peace of said county in an action of debt in the name of the county of Cook: *Provided,* that so much of this act as relates to the sale of intoxicating drink within four miles may be repealed by the general assembly whenever they may think proper.

§ 3. The said corporation shall have power to take, hold, use and manage, lease and dispose of all such property as may in any manner come to said corporation charged with any trust or trusts in conformity with trusts and direction and so execute all such trusts as may be confided to it.

§ 4. That all property of whatever kind or description belonging to or owned by said corporation shall be forever free from taxation for any and all purposes.

§ 5. This act shall be a public act and take effect from and after its passage.

Approved Feb. 14, 1855.

Supreme Court, U. S.
FILED
APR 7 1978
MICHAEL RODAK, JR., CLERK

No. 77-1176

In the

Supreme Court of the United States

OCTOBER TERM, 1977

NABISCO, INC. and PEPSI-COLA GENERAL BOTTLERS, INC.,

Appellants,

vs.

BERNARD KORZEN, et al.,

Appellees.

Appeal from the Supreme Court of Illinois.

MOTION TO DISMISS OR AFFIRM

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IN THE

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Appellants,

vs.

BERNARD KORZEN, et al.,

Appellees.

Appeal from the Supreme Court of Illinois.

MOTION TO DISMISS OR AFFIRM

The defendants-appellees in the above-entitled cause respectfully move this Court to dismiss this appeal on the grounds that the questions presented are so insubstantial as not to need further argument. Alternatively, the defendants-appellees move that the judgment of the Illinois Supreme Court be affirmed since it is clearly correct.

ARGUMENT

I.

THE CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION SINCE EVEN NORTHWESTERN UNIVERSITY, THE HOLDER OF THE CHARTER EXEMPTION AND THE PARTY ON WHOM THE ECONOMIC BURDEN OF THE TAX ULTIMATELY FALLS, ADMITS THAT ITS LESSEES MAY BE ASSESSED A LEASEHOLD TAX.

The Illinois Supreme Court has held that Northwestern's Charter tax exemption cannot be extended so as to proscribe the assessment of a leasehold tax on a lessee of Northwestern. The Illinois Supreme Court grounded its ruling on this Court's decision in the similar case of *Jetton* v. *University of the South,* 208 U.S. 489, 28 S.Ct. 375, 52 L.Ed. 584 (1908). In *Jetton,* this Court held:

> "As long as different interests may exist in the same land, we think it plain that an exemption granted to the owner of the land in fee does not extend to an exemption from taxation of an interest in the same land, granted by the owner of the fee to another person as a lessee for a term of years. The two interests are totally distinct, and the exemption of one from taxation plainly does not thereby exempt the other." [208 U.S. at 500, 28 S.Ct. at 377, 52 L.Ed. at 588.]

Accordingly, in light of the United States Supreme Court's clear holding, appellees respectfully suggest that there is no substantial federal question in the case at bar to be considered. Indeed, as the Illinois Supreme Court noted (Appellants App., p. 10), Northwestern University (in its *Amicus* filing), the holder of the Charter exemption, has not argued that a leasehold tax is entirely illegal and unconstitutional, but rather that the leaseholds in question have been erroneously and excessively assessed:

> "The issue . . . is not whether a lessee's leasehold interest is a separate property interest subject to tax. Such leasehold interests have been subject to tax for decades in Illinois and elsewhere." [Northwestern's *Amicus* Brief in the Illinois Supreme Court, pp. 25-26.]
>
> "Instead of taxing the leaseholds on what those leaseholds are actually worth, Cook County used as the assessed valuations the amounts attributed to the values of the *improvements* on the properties." [Northwestern's *Amicus* Brief in the United States Supreme Court, p. 7.]

Northwestern has never objected to the leasehold tax as properly assessed and levied against its lessees. Northwestern has objected, rather, to the method of assessment and assessed valuations in the case at bar. However, neither plaintiffs (Nabisco and Pepsi-Cola) ever argued before the Illinois Supreme Court that the method of assessment or assessed valuations were erroneous. Plaintiffs argued only that the tax *in toto* was unconstitutional. Northwestern's arguments are not properly presented.

Moreover, the Illinois leasehold tax and leasehold tax act were in effect prior to the Illinois legislature's grant of Northwestern's Charter exemption in 1855. Illinois Laws of 1853, p. 39, § 5; *LaSalle County Manufacturing Co.* v. *City of Ottawa,* 16 Ill. 418 (1855). Indeed, counsel for Pepsi-Cola General Bottlers, Inc. has represented to the trial court that the Continental Illinois National Bank, a lessee of Northwestern, has been paying approximately one million dollars per year to the County Collector for leasehold taxes. (No. 48313, R. 107.) Notwithstanding plaintiff's arguments to the contrary, lessees of Northwestern have been assessed leasehold taxes for many years. See, *In re Northwestern University,* 206 Ill. 64 (1903)

where the court noted that the leasehold tax was being assessed. See also Gale, *Assessment and Collection of Taxes,* 1952 U. Ill. L. F. 192, 195, where it was noted that lessees of Northwestern were being assessed a leasehold tax.

Finally, it should be noted that the Supremacy Clause does not bar state and local governments from assessing leasehold or use taxes to lessees of the United States. And this is true notwithstanding the fact that the economic burden of the tax may fall on the United States. *United States* v. *City of Detroit,* 355 U.S. 466, 78 S.Ct. 474, 2 L. Ed.2d 424 (1958); *United States* v. *County of Fresno,* 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977).

The appellees respectfully submit that the foregoing analysis clearly demonstrates that the matters which the appellants seek to raise in this appeal are questions of State law which only peripherally touch upon federal law.

II.

THE ILLINOIS SUPREME COURT CORRECTLY HELD THAT THE LEASEHOLD TAX IS NOT AN UNCONSTITUTIONAL IMPAIRMENT OF NORTHWESTERN'S CHARTER EXEMPTION.

The Illinois Supreme Court's decision is clearly correct. *Jetton* v. *University of the South,* 208 U.S. 489, 28 S.Ct. 375, 52 L.Ed. 584 (1908), is virtually indistinguishable from the case at bar. The plaintiffs' reliance on *Wright* v. *Central of Georgia Ry.,* 236 U.S. 674, 35 S.Ct. 471, 59 L.Ed. 781 (1915) and *Central of Georgia Ry.* v. *Wright,* 248 U.S. 525, 39 S.Ct. 181, 63 L.Ed. 401 (1918), is misplaced. Those cases dealt with a railroad company leasing out its right-of-way to another railroad company. The property, however, was still *used* as a railroad. This Court held that since the Georgia legislature intended

that railroads expand, the exemption to the lessor should be available to a lessee who uses the right-of-way for the intended purpose—as a railroad. Indeed, this Court stated:

> "We are not suggesting that the contract in the charters of the lessors passed by assignment to the lessee, *nor are we implying that the property was exempted generally, into whosoever hands it might come.*" [Emphasis added.] [236 U.S. at 680, 35 S.Ct. at 472, 59 L.Ed. at 785.]

The thrust of plaintiffs' argument, though, is that all lessees of Northwestern, regardless of the use to which they put the leased property, are exempt from a leasehold tax. However, plaintiffs' arguments are refuted by the very case upon which they attempt to rely. It should also be noted that the *Wright* cases have never been followed or cited by any court for the proposition plaintiffs now urge upon this Court. *Jetton* and the underlying rationale of it, however, have been followed to sustain leasehold taxes. See *Iron County* v. *State Tax Commission,* 437 S.W. 2d 665 (Mo., 1968) and *Otter Trail Power Co.* v. *Degnan,* 252 N.W. 619 (N.D., 1934).

Nabisco also argues that, "as to any period when the burden of the leasehold tax is borne by Northwestern's lessees . . ., the tax would violate the lessees' rights to equal protection of the laws."* However, Nabisco has

---

* Plaintiff Pepsi-Cola never pleaded this alleged Constitutional deprivation in its Complaint, and Pepsi-Cola did not argue this point in its initial brief before the Illinois Supreme Court. Pepsi-Cola has waived the argument. Note that the Illinois Supreme Court refers only to Nabisco's equal protection challenge. (Appellants' App., p. 9.)

pleaded in its Complaint and argued that the economic burden of the leasehold tax, as assessed to Nabisco in the case at bar, will ultimately be passed on to Northwestern due to their contractual agreement. Nabisco has therefore admitted that its equal protection rights have not been violated even though the leasehold tax has been sustained. Moreover, and in any event, this Court's decision in *Trimble* v. *City of Seattle,* 231 U.S. 683, 34 S.Ct. 218, 58 L.Ed. 435 (1913) squarely refutes Nabisco's contention:

> "It is urged that to deny the state's obligation [not to tax its lessees] discriminates unconstitutionally against this class of lessees, since all others are free from the burden. But that is not true. Whether landlord or tenant shall pay a tax is a matter of private arrangement, and the practice one way or the other has no bearing on the matter. The argument from inequality really works the other way. If these leaseholds are not taxable, they are a favored class of property; for ordinarily leaseholds are taxed even if they are lumped and included in the value of the fee." [231 U.S. at 689-90, 34 S.Ct. at 219, 58 L.Ed. at 438-39.]

CONCLUSION

Wherefore, appellees respectfully submit that the questions presented by this cause are so insubstantial as not to need further argument, and that the appeal should be dismissed. Alternatively, appellees respectfully submit that the judgment entered in this cause by the Illinois Supreme Court is clearly correct and should be affirmed.

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No. 77-1176

In the Supreme Court of the United States

OCTOBER TERM, 1977

NABISCO, INC. and PEPSI-COLA GENERAL BOTTLERS, INC.,
Appellants,

v.

BERNARD KORZEN, et al.,
Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Appellants Nabisco, Inc. and Pepsi-Cola General Bottlers, Inc. submit this brief in support of their appeal and in opposition to the Motion of defendants-appellees to dismiss or affirm.

Defendants do not dispute the basic points that underlie the appeal: (1) Northwestern's charter exemption is a binding contract protected against impairment by the United States Constitution; (2) the purpose of the charter's tax exemption provision was to subsidize the University's educational program; (3) that purpose has been held for

more than a century to preclude the collection of real estate taxes with respect to property owned by Northwestern and leased to business firms for commercial uses; and (4) the burden of the leasehold taxes at issue here will ultimately fall upon Northwestern (in the amount of approximately $1,000,000 per year) and will substantially deprive Northwestern of the subsidy benefits it obtains from its charter tax exemption.

Defendants' entire argument is that they have succeeded in evading the constitutional requirements and imposing the burden of real estate taxes on Northwestern because of the technique of assessing the tax against Northwestern's lessees. It is appellants' position that the constitutional requirements may not be avoided by a change in labels. It is this important issue which underlies the appeal. Nothing in defendants' Motion to Dismiss or Affirm detracts from the sharpness or importance of that question.

In this brief we reply to three matters suggested by defendants, apparently in an effort to minimize the novelty and importance of the basic issues.

ARGUMENT

First, defendants claim that the brief filed by Northwestern University as *amicus curiae* indicates that Northwestern does not view the tax as an impairment of its charter but only contends "that the leaseholds in question have been erroneously and excessively assessed." (Defts' Motion 2).

This argument is a clear misconstruction of Northwestern's *amicus* brief. That brief does not argue that the leasehold interests have been "excessively assessed." Northwestern contends that the leaseholds have not been assessed at all. Instead, defendants have assessed Northwestern's fee interest in the property and then sent the tax bills to the lessees—ultimately, to be paid by Northwestern in the form of rent reductions—a process which deprives Northwestern of the benefit of its charter tax exemption and impairs its constitutional rights. As Northwestern itself stated:

> "What is at issue in this case is not the proper valuation methods for taxing a leasehold estate. What is at issue here is the imposition of the leasehold tax which, under the facts of this case, will deprive Northwestern of the benefits of its Charter contract." (Northwestern Br. 9).

After noting that the present "so-called leasehold taxes" would if sustained deprive the University of $1,000,000 per year, Northwestern stated:

> "Because the State may not tax Northwestern on property it owns, the issue is whether the State may tax Northwestern's lessees on what Northwestern owns —if the inevitable result is exactly the same as if Northwestern's property were taxed.
>
> ". . . The effect . . . would be to place the tax burden on Northwestern because of property it owns.

> "If this consequence were permitted, then the Charter exemption would be rendered a nullity with respect to properties leased by the University to provide revenues for education; and the Legislature's purpose in creating the Charter exemption and making it applicable to properties leased to provide educational revenues, which this Court has recognized and enforced, would be completely undermined." (Northwestern Br. 13-14).

Second, defendants argue that the leasehold taxes have been routinely assessed against Northwestern lessees for many years under an 1853 statute—thus suggesting that the issues in the present appeal are neither novel nor important. (Defts' Motion 3-4). These contentions are incorrect. While the defendants attempt to create a *dehors* the record illusion that Northwestern lessees have paid leasehold taxes assessed over the last 125 years since the grant of the Northwestern charter exemption (see Defts' Motion 3), the record as made by the complaints of Nabisco and Pepsi-Cola establishes that such taxes were *not* assessed to, or paid by, Northwestern's lessees during this period.[1] The majority opinion of the Supreme Court of Illinois did not rely upon any such past practice of taxation of Northwestern lessees. The dissenting judges specifically cited the *absence* of any prior taxation of Northwestern's lessees as an argument against the construction of the leasehold tax statute adopted by the majority. The dissenters stated:

> "... [T]he existence for more than a century of statutory provisions similar to section 26 (1853 Ill. Laws 39, sec. 5) without their application in the manner now attempted would seem to be some indication of the opinion of taxing authorities regarding their applicability to Northwestern's lessees." (App. 18).

---

[1] In fact, during 1964, defendants attempted unsuccessfully to assess Nabisco's leaseholds under Section 26. Northwestern objected to the assessments as impairments of its Charter, and the leaseholds were held exempt from taxation by the Board of Appeals of Cook County and by the Illinois Department of Revenue. (NR. C59-60).

Furthermore, if the taxing authorities had thought that they could tax the leased real estate by means of the leasehold tax, they would not have engaged in their repeated unsuccessful attempts to tax Northwestern directly in the century between *University* v. *People ex rel. Miller*, 99 U.S. 309 (1878), and *People ex rel. County Collector of Cook County* v. *Northwestern Univ.*, 51 Ill.2d 131, 281 N.E.2d 334, *cert. denied*, 409 U.S. 852 (1972). And if these taxes were well established, Northwestern University would not file a brief with this Court arguing that their application will cost the University $1,000,000 per year. (Northwestern Br. 8).

Third, defendants contend that this Court has answered the questions presented by this appeal in *Jetton* v. *University of the South*, 208 U.S. 489 (1908), and that the later *Central of Georgia* cases, in which this Court declined to follow its earlier decision in *Jetton*, are inapposite because in those cases the lessee used the leaseholds for the same railroad purposes for which the lessor's exemption had been granted. However, a fair reading of the *Central of Georgia* cases shows that those decisions did not turn on the nature of the lessee's business. Instead, the leasehold taxes in the *Central of Georgia* cases were voided because "the protection of the lessee [was] necessary in order to make good that promised to the lessor." 236 U.S. 674, 680 (1915).

Moreover, defendants' argument ignores the fact that Nabisco's and Pepsi-Cola's leaseholds *are* used to subsidize and further the educational purposes for which Northwestern's charter exemption was created. As this Court stated in the first Northwestern charter case, *University* v. *People ex rel. Miller*, 99 U.S. 309, 324 (1878), property leased by Northwestern to raise revenues for its educational services "is held for school purposes, in the fullest and clearest sense." *Jetton* did not involve a subsidy exemption such as Northwestern's, but rather an exemption designed to maintain a buffer zone around a campus to protect against undesirable elements adjacent

to the school, and the taxes imposed in *Jetton* did not affect or interfere with that purpose. The taxes at issue in the *Central of Georgia* cases, like those involved on this appeal, violated the purpose for the exemption, which was to subsidize the lessor's operations. For that reason, the *Central of Georgia* cases, rather than *Jetton*, are controlling of the constitutional issues in this case.

CONCLUSION

Defendants' Motion does not detract from the existence or importance of the constitutional issues raised in the Jurisdictional Statement. The Court should note probable jurisdiction of this appeal and, upon plenary consideration of the appeal, reverse the judgment of the Supreme Court of Illinois.

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NO. 77-1176

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1977

No. 77-1176

NABISCO, INC., and PEPSI-COLA GENERAL BOTTLERS, INC.,
Appellants,
v.
BERNARD KORZEN, et al.,
Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF OF NORTHWESTERN UNIVERSITY

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NO. 77-1176

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

No. 77-1176

NABISCO, INC., and PEPSI-COLA GENERAL BOTTLERS, INC.,

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Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Now comes Northwestern University and, pursuant to Rule 42 of the Rules of this Court, moves for an order permitting it to file a brief herein as *amicus curiae*. In support of its motion, Northwestern University respectfully states as follows:

1. Appellants present for review by this Court the question of whether, consistent with Article I, Section 10 of the Constitution of the United States, the State of Illinois may impose a leasehold tax upon lessees of real estate owned by Northwestern University where the burden of such tax will be shifted to Northwestern in violation of a charter tax exemption previously granted Northwestern. This tax undermines Northwestern's Charter and frustrates the purpose intended to be accomplished by the grant of tax exemption. The tax burden ultimately imposed on Northwestern would amount to approximately $1 million annually—a staggering burden for a privately-financed university. Moreover, in the

short run, Northwestern and the lessees would be thrust into disputes over who must bear the burden of such taxes under the terms of many different lease agreements.

2. Because Northwestern is a real party in interest in this case, Northwestern sought the consent of appellants and appellees to file its brief *amicus curiae*. Although appellants indicated their willingness to consent, appellees declined to do so. Thus, Northwestern files this motion for leave to present its views on this question which it believes may not be fully or adequately presented by the parties. Although appellants raise the substantial constitutional question regarding the impairment of the obligation of Northwestern's contract, they have also raised the constitutional question of whether the short run application of the burden of the leasehold tax on Northwestern's lessees might deprive them of equal protection of the laws. The possibility exists, therefore, that appellants might not adequately deal with the issue of the impairment of Northwestern's Charter contract, which is the issue of paramount concern to Northwestern. This possibility is heightened by the fact that Northwestern has for over a hundred years successfully defended its Charter tax exemption from direct attempts by the Cook County tax officials to nullify its provisions. *Northwestern University* v. *People*, 99 U.S. 309 (1878); *In Re Northwestern University*, 206 Ill. 64, 69 N.E. 75 (1903); *Northwestern University* v. *Hanberg*, 237 Ill. 185, 86 N.E. 734 (1908); *People ex rel. County Collector* v. *Northwestern University*, 51 Ill.2d 131, 281 N.E.2d 334 (1972), *cert. den.*, 409 U.S. 852 (1972).

3. Unlike most cases where the interests of *amicus curiae* are often collateral to the issues raised by the parties, here Northwestern is a real party in interest. In this situation, the charter exemption which Northwestern was granted, and which has been repeatedly sustained by decisions of this Court and the Illinois Supreme Court, is at stake. Northwestern is thus the ultimate stakeholder and is, therefore, in the best position to argue to the Court, through a brief as *amicus curiae*, the substantial constitutional question presented.

For these reasons, Northwestern University requests leave to file its brief as *amicus curiae*, at or before the time set for the filing of the brief of the appellants herein.

Respectfully submitted,

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NO. 77-1176

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1977

No. 77-1176

NABISCO, INC., and PEPSI-COLA GENERAL BOTTLERS, INC.,

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Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF OF NORTHWESTERN UNIVERSITY AS AMICUS CURIAE

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TABLE OF CONTENTS

	Page
Interest of Amicus Curiae	1
Question Presented	2
Statement of the Case	3
Argument	8
Conclusion	18

INDEX OF AUTHORITIES

Cases:	Page
Central of Georgia Ry. Co. v. *Wright*, 248 U.S. 525 (1919)	14, 15
Illinois Industrial University v. *Board of Supervisors*, 76 Ill. 184 (1875)	11
In Re Northwestern University, 206 Ill. 64, 69 N.E. 75 (1903)	2, 6, 11
Jetton v. *University of the South*, 208 U.S. 489 (1908)	8, 16
Nabisco, Inc. v. *Korzen*, 68 Ill.2d 441, 369 N.E.2d 829 (1977)	8, 9, 10, 16, 17
Northwestern University v. *Hanberg*, 237 Ill. 185, 86 N.E. 734 (1908)	2, 6, 11
Northwestern University v. *People*, 99 U.S. 309 (1878)	2, 6, 11
People ex rel. County Collector v. *Northwestern University*, 51 Ill.2d 131, 281 N.E.2d 334 (1972), cert. den., 409 U.S. 852 (1972)	2, 4, 6, 11, 12
Wright v. *Central of Georgia Ry.*, 236 U.S. 674 (1915)	14, 15
State Statutes:	
Ill. Rev. Stat., Ch. 120, §26 (1975)	2, 3, 8, 9, 10
Ill. Rev. Stat., p. 75, Art. 9, §3 (1874)	5
Ill. Rev. Stat., p. 857, Ch. 120, §2 (1882)	5

NO. 77-1176

IN THE

SUPREME COURT OF THE UNITED STATES

January Term, 1978

No. 77-1176

NABISCO, INC., and PEPSI-COLA GENERAL BOTTLERS, INC.,

Appellants,

v.

BERNARD KORZEN, et al.,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF OF NORTHWESTERN UNIVERSITY AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

Northwestern University, a private non-profit educational institution of higher learning, was granted by the State of Illinois, in an 1855 amendment to its Charter, an exemption from taxation on real estate owned by the University. The Legislature's purpose in granting the tax exemption was to promote the public interest in fostering the development and maintenance of higher education. To that end, Northwestern has leased real estate owned by the University to commercial lessees, such as appellants herein, applying the monies thus earned to the furtherance of the University's educational purposes.

Over the course of the hundred years that Northwestern has leased real estate for commercial use, the Cook County tax officials, appellees herein, have made repeated efforts to levy taxes

on real estate owned and leased by the University. In each instance, Northwestern's Charter tax exemption was sustained as a valid and binding contract which could not be impaired by subsequent legislation and, as a result, a tax on real estate owned and leased by Northwestern is impermissible. *Northwestern University* v. *People*, 99 U.S. 309 (1878); *In Re Northwestern University*, 206 Ill. 64, 69 N.E. 75 (1903); *Northwestern University* v. *Hanberg*, 237 Ill. 185, 86 N.E. 734 (1908); *People ex rel. County Collector* v. *Northwestern University*, 51 Ill.2d 131, 281 N.E.2d 334 (1972), *cert. den.*, 409 U.S. 852 (1972).

This appeal arises from Cook County's most recent attempt to circumvent the previous decisions of this Court and the Illinois Supreme Court, which hold that Northwestern's Charter contract may not be impaired. Cook County has assessed and seeks to collect a leasehold tax which is not based on the value of the lessees' interest. Rather, the tax officials have taxed Northwestern's lessees based on the value of property which the lessees do *not* own—but which instead is owned by Northwestern.

There is no question that this tax would ultimately and inevitably be borne by Northwestern because when leases are negotiated in the future, the rents which prospective lessees are willing to pay will be reduced. Thus, the net effect would be to impair the Charter contract.

Northwestern University is a real party in interest in these appeals and it is its purpose here to demonstrate that the leasehold tax violates Northwestern's Charter contrary to the Obligations of Contracts Clause of the United States Constitution.

QUESTION PRESENTED

Whether Section 26 of the Illinois Revenue Act of 1939, Ill. Rev. Stat., Ch. 120, §507 (1975), which provides for taxing leaseholds estates "when real estate which is exempt from taxation is leased to another whose property is not exempt," may be applied to tax a lessee for property which belongs not to the lessee but to the lessor, the owner of the fee, when the effect of doing so would be to impair a valid and binding Charter contract tax exemption in violation of Article I, Section 10 of the United States Constitution.

STATEMENT OF THE CASE

The undergraduate campus of Northwestern University is located in Evanston, Illinois. The University also maintains a campus in Chicago, Illinois, where the professional schools of law, medicine, and dentistry, the Evening Divisions, and part of the Graduate School of Management are located.

Northwestern University received its Charter from the State of Illinois in 1851.[1] This Charter provides that the University's Trustees shall hold its property "*solely for the purposes of education*, and not as a stock for the individual benefit of themselves or any contributor to the endowment of the same." (Emphasis supplied; App. 29, Section 2.) It further provides that the University, through its Trustees, shall have the power to lease its real estate:

> "to grant, bargain, sell, convey, devise, let, place out at interest, or otherwise dispose of the same for the use of said institution, in such manner as to them shall seem most beneficial to said institution." (App. 30, Section 4.)

---

[1]The Act to Incorporate Northwestern University and the First Amendment thereto (the "Charter"), are attached as Appendix 6, pp. 28-33 of Appellants' Jurisdictional Statement. Throughout this Brief, references to the Charter provisions in Appendix 6 are cited as "App. _____, Section _____."

The proceeds of such sales and leases, like other assets of the University, are to be devoted solely to its enumerated educational purposes:

> "Said corporation shall faithfully apply all the funds collected, or the proceeds of the property belonging to said institution, according to their best judgment, in erecting and completing suitable buildings, supporting necessary officers, instructors, and servants, and procuring books, maps, charts, globes, and philosophical, chemical, and other apparatus necessary to the success of the institution, and do all other acts usually performed by similar institutions that may be deemed necessary or useful to the success of said institution under the restrictions herein imposed." (*Id.*)

The Charter also provides that Northwestern "shall not be allowed to hold more than two thousand acres of land at any one time, unless the said corporation shall have received the same by gift, grant, or devise," with an additional provision that in the event gifts result in total land holdings of over two thousand acres the University is required to sell the excess within ten years. (*Id.*)

The Charter was amended by the Legislature in 1855 by an act which provided, among other things, "That all property, of whatever kind or description, belonging to or owned by said corporation, shall be forever free from taxation for any and all purposes." (App. 33, Section 4.) Later in that same year, the University opened and enrolled its first students.

Unlike a number of institutions of higher learning in Illinois, including schools (such as the University of Illinois) which are supported directly out of tax revenues, Northwestern University's operating revenues have been generated through private gifts of land and other private gifts, in addition to tuition. The reasons for this are historical. Northwestern's Charter was granted pursuant to Article 9, Section 3 of the Illinois Constitution of 1848, which provides that:

> "The property of the state and counties, both real and personal, and such other property as the general assembly may deem necessary for school, religious and charitable purposes, may be exempted from taxation."

In 1848, Illinois was an economically undeveloped State, with a large debt and insufficient means with which directly to establish educational institutions requiring continuing sources of revenue to support professors and maintain the institutions. The State met this problem by incorporating a number of private schools, which were authorized to own property, lease it, and use the proceeds to support their educational programs. An integral part of this approach was the permanent exemption from taxation accorded those schools, which served the same function as an endowment of property producing annual revenues. At every session of the State Legislature between 1848 and 1870, charters were enacted creating educational institutions throughout the State with full exemption from taxation for property held by them.

In 1870 a new State Constitution was adopted. This Constitution contained a new provision for exemption of educational and charitable institutions from taxation, limiting the Legislature's power to grant tax exemptions for colleges and universities to property which was itself used exclusively for school purposes (Ill. Rev. Stat., p. 75, Art. 9, §3 (1874)):

> "The property of the state, counties and other municipal corporations, both real and personal, and such other property as may be used exclusively for agricultural and horticultural societies, for school, religious, cemetery and charitable purposes, may be exempted from taxation; but such exemption shall be only by general law."[2]

---

[2]At the next session of the Legislature, acting pursuant to the new Constitution, the Legislature adopted a new revenue law providing for such limited tax exemption, applicable to (Ill. Rev. Stat., p. 857, Ch. 120, §2 (1882)):

> "All property of institutions of learning, including the real estate on which the institutions are located, not leased by such institutions or otherwise used with a view to profit."

Thereafter, Cook County levied taxes on certain properties owned and leased by Northwestern, and Northwestern objected to the taxes on the ground that its property was exempt from taxation under its Charter. The case reached this Court, which held that the Charter was a valid and binding contract, and that the tax exemption provided by the Charter could not be impaired by subsequent legislation. *Northwestern University* v. *People*, 99 U.S. 309 (1878).

In 1903, Cook County challenged the Charter exemption with respect to property acquired prior to the 1855 exemption. The Illinois Supreme Court, *In Re Northwestern University*, 206 Ill. 64, 69 N.E. 75 (1903), held that the language of the Charter exemption—"all property, of whatever kind or description, belonging to or owned by said corporation,"—applied to property acquired prior to 1855. Again, in 1905, Cook County attacked the exemption, this time with respect to property acquired after 1855. The Illinois Supreme Court, in *Northwestern University* v. *Hanberg*, 237 Ill. 185, 86 N.E. 734 (1908), held that the exemption applied to property acquired after, as well as before, 1855.

In 1970, Cook County again sought to tax real estate owned by Northwestern, this time on the theory that the Charter exemption was an unconstitutional discrimination against educational institutions founded after 1870 which did not receive Charter exemptions. The Illinois Supreme Court, in *People ex rel. County Collector* v. *Northwestern University*, 51 Ill.2d 131, 281, N.E.2d 334, *cert. den.*, 409 U.S. 852 (1972), unanimously rejected this attack on Northwestern's Charter. The Court recognized that the granting of such tax exemptions "was not at all unusual" in the 1850's, and that the legislature's purpose in granting an exemption to Northwestern was to induce donations to the institution and thus to promote the public interest in fostering higher education (51 Ill.2d at 134, 281 N.E.2d at 335):

> "[A]s of the date when the tax exemption was enacted as a means of inducing donations to the institution, the tax exemption was not at all unusual. The public interest in higher education was recognized in the early days of the State, but at that time the recognition took the form of special charters authorizing the incorporation of particular educational institutions. The Charters contained tax exemptions, the terms of which varied, apparently in accordance with the inducement thought necessary to bring about contributions to establish and maintain the institutions."

As a result of these four decisions, Northwestern has remained exempt from taxes on its real estate properties.

Although Northwestern was originally authorized to own up to 2,000 acres of land, and although the Legislature in 1855 expressly authorized Northwestern to lease its land and clearly contemplated that much of Northwestern's land would be leased or otherwise used for the purpose of producing revenues for the continuing support of Northwestern's educational program, the University's land holdings have never approached the ceiling of 2,000 acres. Northwestern, in the early years of its history, owned approximately 680 acres of land in Cook County. It owns only about 430 acres today, of which only about 70 acres are leased to provide revenues for educational purposes.

Three of the properties owned by Northwestern are leased to appellants herein, Nabisco, Inc. and Pepsi-Cola General Bottlers, Inc., and it is the Cook County tax officials' assessment and attempt to collect one year's leasehold taxes on these properties for the tax years 1973 (as to Pepsi-Cola) and 1974 (as to Nabisco) that gives rise to the instant appeals. Instead of taxing the leaseholds on what those leaseholds are actually worth, Cook County used as the assessed valuations the amounts attributed to the values of the *improvements* on the properties. But *these improvements belong to the lessor, Northwestern*—not to the lessee.

As a result of Cook County's application of the Section 26 leasehold tax, the lessees would be made to bear leasehold taxes on

property which does not belong to the lessees, but to Northwestern. To the extent the lessees would be taxed on this excess value, attributable to Northwestern's property rather than their own, the lessees would be that much less willing and able to pay rent to the lessor, Northwestern. Thus, when rental agreements are negotiated, Northwestern would inevitably—as a matter of market necessity—have to bear the entire amount of this tax burden, either by agreeing to pay the lessee's tax or by agreeing to accept less rent. Either way, the burden of the tax would fall on Northwestern.

It is estimated that if Cook County's unconstitutional application of Section 26 is not prevented, Northwestern would ultimately bear a tax burden of approximately $1 million annually. The magnitude of this adverse impact on the University's finances may be perceived from the fact that this amount is approximately equivalent to two-thirds of Northwestern's current annual budget for library books. It is also approximately equivalent to one-tenth of the amount granted annually by the University in student scholarships. Moreover, the impact of this tax would have placed the University in a deficit position for fiscal periods 1973-74 and 1974-75.[3]

ARGUMENT

The Illinois Supreme Court's opinion from which these appeals arise, *Nabisco, Inc.* v. *Korzen*, 68 Ill.2d 441, 369 N.E.2d 829 (1977), holds that under *Jetton* v. *University of The South*, 208 U.S. 489 (1908), and other cases, Northwestern University's Charter tax exemption does not preclude the taxing of the lease-

[3]The amounts expended by Northwestern University for library books during the school years 1973-1974, 1974-1975 were respectively $1,555,168 and $1,300,782. The expenditures for student scholarships for the years 1973-1974 and 1974-1975 were respectively $10,744,677 and $9,135,807. The University's surplus for the fiscal periods 1973-1974, 1974-75 was respectively $598,135 and $354,397.

hold estates of lessees of Northwestern under Section 26 of the Illinois Revenue Act. The Illinois Supreme Court, as well as Cook County,[4] concedes however that (68 Ill.2d at 457; 369 N.E.2d at 831):

> "Northwestern's tax exemption constitutes a contract between the State and the University which cannot be impaired by subsequent legislation imposing taxes upon its property whether that property be directly used for school purposes or leased to others and the proceeds used for school purposes."

As the dissenting judges observed, the majority opinion of the Illinois Supreme Court ignores that, under the facts of this case, the effect of the application of Section 26 will be to nullify Northwestern's Charter by depriving the University of funds intended to further its educational purposes (68 Ill.2d at 467; 369 N.E.2d at 836):

> "In discussing the effect of the taxes here in question defendants [Cook County tax officials] concede that sustaining the tax will result in a reduction in Northwestern's income from its leased property by compelling the university, depending on the interpretation of its lease clauses, to reimburse its lessees for taxes paid, forgo its right to the additional rent it now receives in lieu of taxes, or accept a lower rental when its leases must be renegotiated. The allegations by plaintiffs and Northwestern that these immediate or ultimate losses of income resulting from imposition of the tax will exceed $1,000,000 are not contradicted."

What is at issue in this case is not the proper valuation methods for taxing a leasehold estate. What is at issue here is the imposition of the leasehold tax which, under the facts of this case, will deprive Northwestern of the benefits of its Charter contract. As

[4]Brief and Argument for Defendant-Appellants, Cook County tax officials, submitted to the Illinois Supreme Court, Appeal No. 48251, p. 19.

the dissenting judges observed (68 Ill.2d at 468–69; 369 N.E.2d at 837):

> "Northwestern's lease with Pepsi-Cola expressly requires payment by the lessee of 'tax-lieu rent'—an amount, agreed upon by the parties at four-year intervals, representing the approximate amount which would be payable in taxes were the property not exempt. For 1974 the amount of 'tax-lieu rent' claimed by Northwestern was $87,150. The tax bill received by Pepsi in August of that year, for 1973 taxes, was $83,498.10. *Quite clearly demonstrated is the fact that taxation of this leasehold interest is, for all practical purposes, the equivalent of taxing Northwestern upon its exempt fee interest, thus, as to this leased property, effectively nullifying its exemption.* The university will no longer receive 'tax-lieu rent' from Pepsi-Cola, and Nabisco will deduct its taxes from rental payments. This subversion of Northwestern's exemption is, in [our] judgment, a clear impairment of its charter contract in violation of section 10 of article I of the Constitution of the United States." (Emphasis added).

Here Cook County has not sought to tax Northwestern's lessees on what they own. Instead, Cook County has sought to tax the lessees *on what they do not own*—but on what Northwestern owns. Thus, it is trying to make the lessee pay a tax—not on its leasehold—but on the property owned by the lessor, the University. It is uncontroverted that the effect of applying Section 26 in this manner would inevitably be to shift this tax burden (attributable to property owned by Northwestern) from the lessee to the lessor—either directly, if the lease terms so provide, or indirectly, by an eventual reduction in rent the lessee would be able or willing to pay. In either event, such an application of Section 26 would deprive the University of a benefit which it was the purpose of the Charter to protect, and would thus result in the loss of revenues which the Legislature intended would be used by the University to promote the purposes for which it was chartered—i.e., higher education.

I. NORTHWESTERN UNIVERSITY'S PROPERTY, INCLUDING ITS FEE INTEREST IN THE PROPERTIES LEASED TO NABISCO AND PEPSI-COLA, MAY NOT BE TAXED

The uncontroverted legal premise which constitutes the starting point for analysis in these appeals is that Northwestern's fee interest in the properties leased to appellants is exempt from taxation by its Charter and under the Obligation of Contracts Clause of the United States Constitution. This premise is so plainly established by the previous decisions of this Court and of the Illinois Supreme Court, in *Northwestern University* v. *People*, 99 U.S. 309 (1878), *In Re Northwestern University*, 206 Ill. 64 (1903); *Northwestern University* v. *Hanberg*, 237 Ill. 185 (1908), and *People ex rel. County Collector* v. *Northwestern University*, 51 Ill.2d 131 (1972), *cert. den.*, 409 U.S. 852 (1972), that it is not controverted by Cook County or the opinion of the Illinois Supreme Court.

The Legislature's purpose in granting Northwestern its Charter exemption from taxation is likewise not subject to dispute. At the time the Charter was granted, which was prior to the establishment of land grant colleges and universities and the direct funding of state-administered universities,[5] the only way the State of Illinois had to foster and encourage higher education was to charter colleges and universities, to authorize them to own real es-

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[5]Northwestern's Charter was granted in 1851. Following 1862, with the aid of land grants provided by Congress to the States for the endowment of colleges to teach agriculture and the mechanic arts (Act of July 2, 1862, 12 Stat. 503; 7 U.S.C. §§301 et seq.), the State of Illinois became financially able to provide direct revenue support to higher education. The first appropriation from funds raised by general taxes in support of the Illinois Industrial University, the forerunner of the present University of Illinois, was made in 1869, and increased appropriations followed in succeeding years. See *Illinois Industrial University* v. *Board of Supervisors*, 76 Ill. 184 (1875).

tate and to use it or lease it to provide rental income to support the educational program, and to grant exemptions from property tax.

Accordingly, Northwestern's Charter expressly authorized the University to own and lease real estate:

> "to grant, bargain, sell, convey, *devise, let, place out at interest, or otherwise dispose of* said institution, in such manner *as to them* [the Trustees] *shall seem most beneficial to said institution.*" (App. 30, Section 4; emphasis supplied.)

The proceeds of any leases or sales, like other assets of the University, are to be used solely for its educational purposes. (*Id.*)

The Charter further provided that the University "shall not be allowed to hold more than two thousand acres of land at any one time, unless the said corporation shall have received the same by gift, grant, or devise. . . . " This provision confirms, if confirmation were necessary, that the Legislature expected and intended that Northwestern would rent or otherwise use its properties to raise money to support its educational program. The University could not conceivably have used 2,000 acres entirely for educational facilities. Northwestern's campus at Evanston today comprises only 225 acres, of which 70 acres were added within the last decade as a result of a land-fill in Lake Michigan.

The exemption from property tax granted to Northwestern with respect to its property extended to "all property, of whatever kind or description, belonging to or owned by said corporation. . . ." Such property, including leased property, was declared to be "forever free from taxation for any and all purposes." (App. 33, Section 4). The Illinois Supreme Court in *People ex rel. County Collector* v. *Northwestern University*, 51 Ill.2d 131, 281 N.E.2d 334 (1972), *cert. den.*, 409 U.S. 852 (1972), expressly recognized that the Legislature's purpose in granting this exemption from taxation was to support higher education by inducing contributions to the University—the proceeds of such contributions to be free from taxation (*id.*, at 134; *id.*, at 337); and it unanimously ruled that this purpose, and the exemption which proceeded from it, were fully applicable to property leased to provide revenues to be used for education—there the Dee-El Garage property, a parking garage leased to a commercial tenant, which paid rents to the University. The reasoning and holding of the Illinois Supreme Court in the *Dee-El* case are fully applicable to the properties leased to appellants.

II. THE STATE OF ILLINOIS HAS CIRCUMVENTED THE PROTECTIONS OF THE CHARTER AND THE HOLDINGS OF THIS COURT BY LEVYING A TAX ON NORTHWESTERN'S LESSEES BASED ON PROPERTY ACTUALLY OWNED BY NORTHWESTERN, WHICH WILL UTIMATELY BE BORNE BY NORTHWESTERN, THEREBY CONTRAVENING THE OBLIGATION OF CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION.

Because the State may not tax Northwestern on property it owns, the issue is whether the State may tax Northwestern's lessees on what Northwestern owns—if the inevitable result is exactly the same as if Northwestern's property were taxed.

The consequence of such a tax on the lessee would obviously be the same as taxing Northwestern's property directly, since no lessee would agree to rent the property from Northwestern in such circumstances unless Northwestern either paid the leasehold tax or reduced the rent otherwise payable by the amount of the tax. The effect, in either event, would be to place the tax burden on Northwestern because of property it owns.

If this consequence were permitted, then the Charter exemption would be rendered a nullity with respect to properties leased by the University to provide revenues for education; and the Legislature's purpose in creating the Charter exemption and

making it applicable to properties leased to provide educational revenues, which this Court has recognized and enforced, would be completely undermined.

Because any case involving Charter exemptions from taxation turns on the nature and purpose of the particular provisions in question, cases involving charters different from Northwestern's —where the legislative purpose in granting the exemption may be different, or less clear, than the purpose of the Illinois General Assembly in granting Northwestern its Charter—are not controlling.

Two cases closely in point are *Wright* v. *Central of Georgia Ry.*, 236 U.S. 674 (1915), and *Central of Georgia Ry. Co.* v. *Wright*, 248 U.S. 525 (1919). Two railroads, the Augusta and Savannah Railroad and the Southwestern Railroad, were granted charters by the State of Georgia containing provisions exempting property which they owned from taxation (subject to deductions not here relevant). These two railroads leased their properties to a lessee, which later went into receivership and after reorganization passed to the Central of Georgia Railway Company. The State first sought to collect *ad valorem* taxes on the underlying properties from the lessee. (236 U.S. at 676.) The Court in *Wright* v. *Central of Georgia Ry.*, 236 U.S. 674 (1915), in an opinion by Mr. Justice Holmes, reasoned that jurisdiction to execute for the taxes depended on whether the properties sought to be taxed were properties belonging to the lessee, the plaintiff: "If they are not, the attempt is an attempt to tax the plaintiff upon property that it does not own." (236 U.S. at 677–678.) The Court, after examining the transactions and the purported tax, held that the two lessor railroads had been authorized by their charters to enter into the lease arrangements, and that such leases did not result in a loss of the exemption for the underlying fee interest of those two railroads. Moreover, because the fee was exempt from taxation to the lessors, it was likewise exempt so far as the lessee was concerned. "We cannot suppose that the Legislature meant either to practice a cunning deception or to make a futile grant. Therefore, we are unable to read the charter as making the exemption vain by reserving to the State an unlimited right to impose upon the lessee all that it had renounced as against the lessor" (236 U.S. at 679). This Court thus expressly ruled that the lessee could not be taxed on the exempt fee—"the protection of the lessee being necessary in order to make good that promised to the lessor." (*Id.*, at 680).

In this first *Central of Georgia* case, the State had attempted "to tax the fee as the property of the plaintiff" (*id.*, at 681), *i.e.*, the lessee, and this attempt was invalidated. Thereafter, the State sought to circumvent the effect of this ruling by levying the taxes upon the leasehold interest of the lessee, rather than the fee. In the second *Central of Georgia* case, *Central of Georgia Ry. Co.* v. *Wright*, 248 U.S. 525 (1919), this Court, in a second opinion by Mr. Justice Holmes, invalidated the purported tax on the leasehold, holding that "the reasoning [in the first case] applies with equal force to that now before us."

The reasoning and holding of these two cases are fully applicable here. The lessees, here appellants, cannot be taxed on property which belongs to the owner, Northwestern, since it should not be supposed the Illinois General Assembly in 1855 practiced "a cunning deception" or made "a futile grant" to Northwestern; and the Charter exemption should not be rendered "vain by reserving to the State an unlimited right to impose upon the lessee all that it had renounced as against the lessor" (236 U.S. at 679). And, even more to the point, since the lessees cannot be directly taxed on the value of the fee owned by Northwestern, this "reasoning applied with equal force" to preclude a purported leasehold tax which would have the same effect (248 U.S. at 527).

This Court's second *Central of Georgia* decision is of special significance in this appeal because the Court there distinguished

Jetton v. *University of the South*, 208 U.S. 489 (1908)—the case primarily relied upon below—as not controlling (248 U.S. at 527). In *Jetton* the question had been whether the lessee could be taxed on what the lessee owned, and the Court had answered in the affirmative. In the *Central of Georgia* cases, by contrast, the question was whether the lessee could be taxed on what the lessor—the chartered entity—owned, and the Court held that it could *not* be so taxed, either directly or in the form of a purported leasehold tax.

In the instant action, the Illinois Supreme Court made no effort to square its decision with the *Central of Georgia* cases, relying instead on the holding of *Jetton* v. *University of the South* (68 Ill.2d at 458–461, 369 N.E.2d at 836–39). This was clearly erroneous not only because *Jetton* is distinguishable from the facts of the instant case, but because *Jetton* was not regarded as controlling in the later-decided *Central of Georgia* cases. Moreover, the majority opinion below completely fails to address the issue of whether the leasehold tax as assessed under the facts here places a tax burden on Northwestern in violation of the University's Charter. Indeed, with respect to arguments raised by Northwestern that the tax as assessed was contrary to the Charter and unconstitutional, the majority inexplicably asserted that in view of "the conclusions reached, we need not further consider [Northwestern's] arguments," (68 Ill.2d at 462; 369 N.E.2d at 840), and did not respond at all to the opinion of the dissenting judges who agreed with Northwestern that:

> "Considering the fact that the leasehold tax, as assessed, closely parallels the amount of general real estate taxes collectible on non-exempt property, the practical result is to shift to Northwestern the burden of the tax . . . . Likewise, the inevitable and significant reduction in rental income impairs Northwestern's Charter contract in what [we] believe to be a violation of Section 10 of Article I of the Constitution of the United States.

> As Mr. Justice Holmes wrote in the first *Central of Georgia* case, 'the protection of the lessee being necessary in order to make good that promised to the lessor' . . . , [we] would hold that the Section 26 leasehold tax, as this court has held it must be computed, cannot be imposed upon the plaintiffs herein." (68 Ill.2d at 471–72; 369 N.E.2d at 849–50).

If the decision below is not reversed, the benefit of the Charter exemption which has withstood numerous direct challenges in previous decisions of this Court and the Illinois Supreme Court will be rendered a nullity through the indirect device of a leasehold tax on property owned by Northwestern—not its lessees. The decision below of the Illinois Supreme Court has effectively rendered the Charter exemption meaningless as to commercially based properties, reducing it, in the words of Mr. Justice Holmes in *Central of Georgia*, to no more than a "cunning deception" or "a futile grant." In this situation, the Charter provisions will have been undermined, and the purpose of the Charter of facilitating the development and maintenance of quality private education will have been defeated.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Illinois should be reversed because the leasehold tax as assessed and sought to be collected here is an unconstitutional impairment of the obligations of Northwestern's Charter contract.

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